* Together with:
Baldwin-Lima Hamilton Corp. v. Fed. Trade No. 126

LIBRARY
SUPREME COURT, U. S.

FILED
MAY 24 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 125

LURIA BROTHERS AND COMPANY, INC.,
Petitioner

v.

FEDERAL TRADE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MORRIS WOLF
NATHAN SILBERSTEIN
BURTON CAINE
WOLF, BLOCK, SCHORR and SOLIS-COHEN
12th Floor, Packard Building
Philadelphia, Pennsylvania 19102
Attorneys for Petitioner
Luria Brothers and Company, Inc.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	18

CITATIONS

CASES:

American Committee v. *Subversive Activities Control Board*, 380 U. S. 503 (1965)	7
Commissioner v. *Killian*, 314 F. 2d 852 (5th Cir. 1963)	16
FTC v. *Brown Shoe Co.*, 384 U. S. 316 (1965)	14, 15
Modernistic Candies v. *FTC*, 145 F. 2d 454 (7th Cir. 1944)	16
N. L. R. B. v. *Brown*, 380 U. S. 278 (1965)	17
Protective Committee v. *Anderson*, 88 S. Ct. 1157 (1968)	7
U. S. v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956)	11

STATUTES: PAGE

Clayton Act, Section 3, 38 Stat. 731 (1914) 15 U. S. C. § 14 (1964) 13, 14

Clayton Act, Section 7, 38 Stat. 731 (1914), as amended by 64 Stat. 1125 (1950), 15 U. S. C. § 18 (1964) 4

Federal Trade Commission Act, Section 5(a)(1), 52 Stat. 111 (1938), as amended, 15 U. S. C. § 45(a)(1) (1964) 2, 3, 5, 12, 13, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

LURIA BROTHERS AND COMPANY, INC.,
Petitioner

v.

FEDERAL TRADE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Luria Brothers and Company, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 24, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 389 F. 2d 847 and is printed in the appendix to this petition (App. 1a-33a). The opinions of the Federal Trade Commission are reported at 62 F. T. C. 597 and 649, and are printed in the appendix (App. 34a-127a). The initial decision of the hearing examiner is reported at 62 F. T. C. 262 and is found at pages 2161a to 2668a in the record in the Court of Appeals, a copy of which has been filed with the Clerk of this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1968. A timely petition for rehearing was filed on February 6, 1968 and was denied on February 27, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Is it unlawful for an independent supplier to sell to several buyers—large or small—all, or a large percentage of their respective requirements of a readily available commodity, even through there is no agreement or conspiracy among the buyers to buy from the supplier, nor any agreement or conspiracy between the supplier and *any* buyer, to continue buying, nor any obligation or economic compulsion on any buyer to do so?

STATUTE INVOLVED

The statute involved is Section 5(a)(1) of the Federal Trade Commission Act, 52 Stat. 111 (1938), as amended, 15 U. S. C. § 45(a)(1) (1964), which provides:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

STATEMENT OF THE CASE

Petitioner Luria Brothers and Company, Inc. ("Luria") is a broker, buying and selling iron and steel scrap. The petitioners in a related petition for certiorari growing out of the same proceeding consist of steel mills and foundries who purchased scrap from Luria in varying amounts. For the sake of convenience, the non-Luria petitioners will be referred to as the "mills."

This case began more than 14 years ago when on January 19, 1954, respondent Federal Trade Commission issued a complaint against Luria and the mills. The complaint, as amended, charged that *Luria and the mills* conspired *jointly* to supress competition and create a monopoly in Luria in the purchase and sale of scrap.

It was further charged that in pursuance of such conspiracy, Luria and the mills *"in concert and in cooperation"* (emphasis supplied) performed certain allegedly illegal acts, including engaging Luria as an exclusive or substantially exclusive scrap broker for the mills (R. 26a-27a). This conduct, the Commission charged, violated Section 5 of the Federal Trade Commission Act, 15 U. S. C. § 45(a)(1) (R. 37a).*

Additionally, Luria alone, and in conjunction with the mills was charged with engaging in an enumerated list of unfair acts and practices for the purpose of restraining competition and creating in Luria a monopoly in the purchase and sale of scrap (R. 27a *et seq.*).**

Hearings in support of the complaint commenced January 12, 1955 (R. 4a) and continued intermittently throughout the United States until November 1, 1957 (R. 5a; R. 1979a). At the conclusion of the evidence in support of the complaint, the examiner granted motions by all petitioners to dismiss the complaint insofar as it charged a conspiracy among the mills alone and together with Luria (R. 1980a).

During March, April and May of 1958, petitioners offered evidence in support of their defense (R. 5a-6a).

On March 29, 1961, the examiner issued his initial decision (R. 2161a-2668a). With respect to the issues involved in this petition, he found that the continued purchases

---

*"R." refers to the seven-volume joint appendix in the Court of Appeals which is part of the record, one copy of which has been filed with the Clerk of this Court.

**The complaint contained numerous other charges which are not the subject of this petition for certiorari and will not be discussed herein.

by each mill in greater or lesser quantities from Luria was equivalent to an "agreement" by each mill to do so, and he issued an order, *inter alia,* indefinitely prohibiting dealing pursuant to agreement between each mill and Luria on an "exclusive or substantially exclusive" basis, and for a period of *five years* prohibiting each mill from buying more than 50 per cent of its requirements from Luria (R. 2664a-2667a).

The examiner dismissed each charge of unfair practices.*

---

*The charges and the record citations to their dismissals are as follows:

1. Pressure on railroads and other sources of supply to sell scrap to Luria. Dismissed, R. 2391a; 2392a; 2397a; 2398a.

2. Sales of new steel by the mills with the understanding that the resulting scrap would be sold by fabricators to Luria. Dismissed, R. 2399a.

3. Sales of new steel by the mills to Luria on condition that Luria sell scrap to the mills. Dismissed, R. 2405a.

4. Sales by Luria of new steel conditioned on sale of scrap to Luria by purchasers of new steel. Dismissed, R. 2409a, 2491a, 2425a-2426a.

5. Purchases by Luria of certain (less desirable) grades of scrap conditioned on sale to Luria of other (more desirable) grades. Dismissed, R. 2428a.

6. Purchases of scrap by Luria at inflated prices to prevent competitors from buying such scrap. Dismissed, R. 2460a.

7. Purchases by Luria of scrap yards for purpose of harassing existing dealers who did not sell scrap to Luria to extent desired by Luria. Dismissed, R. 2469a.

8. Pirating by Luria of employees of competitors. Dismissed, R. 2478a.

9. Making of loans and advances by Luria to scrap dealers to induce the dealers to sell their scrap exclusively to Luria. Dismissed, R. 2508a.

10. Acquisitions by Luria for the purpose of injuring competition or creating a monopoly. Dismissed, see R. 2735a-2736a. (There were also six charges of acquisitions in violation of § 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 18. The examiner dismissed four (R. 2508a-2538a). The Commission affirmed the dismissals and dismissed the fifth charge, thus reversing the examiner (R. 2734-2745a). The only § 7 violation which was affirmed related to the acquisition of Southwest Steel Corp. The Court of Appeals affirmed the Commission on this point and petitioner is not seeking review of that decision in this Court.)

Both petitioners and counsel supporting the complaint appealed to the Federal Trade Commission. On November 15, 1962, the Commission handed down its decision. By a vote of 2-1, the Commission agreed with the examiner that Luria's dealings with its customers violated Section 5 of the Federal Trade Commission Act (App. 40a *et seq.*); although Commissioners Anderson and Dixon, who constituted the majority, did not accept the examiner's reasoning. Their final order (App. 116a-121a) differed in important respects from the examiner's.

Commissioner Elman filed a dissenting opinion (App. 107a-115a).

There was no dissent by any commissioner on the dismissal of the unfair practice charges.

Luria and the mills filed exceptions to the proposed final order of the Commission, and on February 13, 1963, the Commission entered its final order (App. 116a-121).

On April 11, 1963, Luria petitioned the Court of Appeals for the Third Circuit to review the Federal Trade Commission order (App. 3a). On January 21, 1966, the matter was argued before Judges McLaughlin, Kalodner and Ganey.

On January 8, 1968, the Court of Appeals in an opinion by Judge McLaughlin, affirmed in its entirety the order of the Commission. On January 24, 1968, the Court entered its judgment. On February 6, 1968, petitioners filed a timely Petition for Rehearing en banc which was denied on February 27, 1968.

Petitioner Luria Brothers and Company, Inc. seeks a writ of certiorari in this Court to review the judgment of the Court of Appeals.

Final Order

In its final form, the Order of the Commission (App. 116a-121a) provided that:

1. Luria cease and desist from (a) contracting or agreeing to act or knowingly acting as exclusive or substantially exclusive broker or supplier of purchased scrap for *any plant of any petitioning mill, or of any other buyer of iron and steel scrap not a party to the proceeding,* and (b) knowingly inducing or receiving preferential status or favored treatment of any kind as broker or supplier of purchased scrap for any petitioning mill or any other buyer of iron and steel scrap.

2. Each of the mills cease and desist from (a) purchasing or contracting or agreeing to purchase, *all or substantially all* its annual requirements of purchased scrap of any plant or plants from or through Luria and from giving preferential status or favored treatment of any nature to Luria, and (b) for five years, from buying more than 50 per cent of the annual requirements of purchased scrap of any of its plants from Luria, except to the extent that adequate scrap was not available from other suppliers on substantially similar and competitive terms with those offered by Luria.

3. (Applies only to export trade.)

4. (For five years prohibits acquisitions by Luria of interests in any business buying or selling scrap as a broker or dealer, without approval of the Commission.)

5. (Orders divestiture by Luria of its interest in Southwest Steel Corporation.)

Although we disagree with the portions of the order dealing with the export trade of Luria and with Luria's divestiture of Southwest Steel Corporation, we recognize that these matters do not have the *general* importance required for a review by this Court on certiorari.

We, therefore, in this petition shall limit ourselves to asking review of the broad and extremely important ques-

tions of law deriving from the first and second paragraphs of the order as described hereinabove.*

These paragraphs in effect unconditionally *forever* prohibit Luria from selling to *any customer anywhere in the world* "all or substantially all" of that customer's requirements of scrap; forever prohibit *every petitioning mill* from buying from Luria for any of its plants "all or substantially all" its scrap; and for *five years* prohibit *every petitioning mill* from buying from Luria *more than 50 per cent* of its scrap requirements at any plant except in emergency situations.

A brief statement of the facts necessary to be known for the consideration of this review follows:

The Luria business began in the most humble possible way about 1889 at Reading, Pennsylvania, and gradually spread through the opening of branch offices across the United States, until, sixty years after it was founded, its activities covered the country.

As the sphere of its activities extended, Luria began selling to many customers including, of course, the mills which are petitioners in this Court. Obviously, as Luria sold to more customers and as the business of the customers increased, the volume of Luria's business increased. More-

---

*If this petition is granted, petitioner Luria will argue, with the Court's permission, two further points: First, the evidence covers the period 1945 to 1954, and after thirteen years the record is too stale to support a prospective order. See *American Committee* v. *Subversive Activities Control Board,* 380 U. S. 503 (1965). Already in 1962, Commissioner Elman, dissenting, said that the record was obsolete (App. 114a) See p. 10, *infra.* A similar thought was expressed by this Court in referring to a bankruptcy plan not nearly so old as the record in the case at bar. *Protective Committee* v. *Anderson,* 88 S. Ct. 1157, 1178 (1968).

Second, the order is punitive in containing an unprecedented provision prohibiting each mill from buying more than 50 per cent of its requirements from Luria for five years. It is also vague in prohibiting "substantially exclusive" dealings without defining what percentage of purchases or sales will constitute a violation of the order.

over, as Commissioner Elman noted (App. 107a), the Korean War (June, 1950 to July, 1953) created an extraordinary demand for scrap and vastly extended the business of Luria and other scrap brokers. The complaint in this case was filed shortly thereafter in January, 1954.

During the period covered by the evidence, 1945 to 1954, ferrous scrap provided about 50 per cent of the content of finished steel, and of that 50 per cent, about half represented scrap which steel mills bought. The other 25 per cent was waste scrap, thrown off by steel mills in the course of manufacturing their products. It is the 25 per cent of purchased scrap which is involved in the present case, and it is the legality of the dealings between Luria and the individual mills in Luria's sales of this scrap to the mills which is the issue of this case.

Over a period of many years, the petitioning mills bought from Luria widely varying percentages of their very different requirements of purchased scrap at their various plants.

Although it was *all* "purchased scrap" on which the Commission based its order defining the percentage of scrap which the mills were permitted to buy from Luria (App. 118a), the Court of Appeals in determining Luria's share of the market illogically considered *only* that part of the *total purchased scrap* which was sold to the *mills through brokers and dealers,* ignoring that part sold by others (App. 9a-10a). Since all sellers of scrap compete with each other, there is no basis upon which to select only brokers and dealers in measuring the percentage of scrap sold by Luria.

For example, the Court of Appeals stated the percentage of scrap bought by Bethlehem from Luria as 81.2% in 1953 and 80.9% in 1954, the last two years considered by the Commission. Whereas, as appears from the examiner's figures at R. 2209a, Luria's share of *all* scrap

purchased by Bethlehem in 1953 was only 64% and in 1954, 50.9%.*

Of course, the tonnages bought by the individual mills varied tremendously. For example, the 100% of its scrap bought by *Edgewater* in 1954 amounted to about 12,000 tons (R. 5651a), whereas, the 50.9% bought by *Bethlehem* in the same year amounted to 845,000 tons (R. 5629a).

Although in minute detail the evidence before the examiner covered the history of the relations between Luria and each of its customers, it is unnecessary to discuss these relations here.

The common denominator of these dealings and the one which presents the legal issue in this case is that the dealings between Luria and its customers did not result from any agreement or conspiracy among the buyers, nor was there—except for two or three very temporary exceptions and one very special situation—any obligation on the part of any customer to continue to buy from the supplier, or any economic compulsion on any customer to do so. (The special situation was one in which Luria at the request of Bethlehem Pacific Coast Steel Corporation constructed a scrap yard additional to one of its plants, in consideration of which investment that mill agreed to buy a certain part of its scrap from Luria. The contract expired some years ago.)

And finally, it is frustrating to go deeply into evidence so stale as the evidence in this case.

---

*With respect to petitioner United States Steel Corporation, the Court of Appeals stated that the mill bought from Luria in 1953, 89.5% of its purchased scrap and in 1954, 93.9% (App. 10a). In fact, these were the purchases only of *one* relatively small plant of U. S. Steel. The percentage of scrap purchased from Luria by *all* of the U. S. Steel plants was 19.7% in 1953 and 11.8% in 1954 (R. 5659a). One might ask by what logic the Court considered only purchases at *one* plant for the purpose of determining exclusivity, and on the basis of that finding sustained an order *against every single plant of United States Steel throughout the country.*

The period examined by the Commission commenced 23 years ago and ended more than 13 years ago. In 1962, Commissioner Elman in his dissenting opinion said:

> "Moreover, the Commission's order, based as it is upon events of nearly a decade ago, has little relevance to present conditions in the scrap market." (App. 114a)

REASONS FOR GRANTING THE WRIT

The Court of Appeals in this case affirmed an order of of the Federal Trade Commission which we submit is unparalleled in judicial history, is unauthorized even under the spreading oak of vagueness of the Federal Trade Commission Act, and enunciates a general doctrine so contrary to the spirit of free enterprise that it demands reconsideration by the Supreme Court.

That order forbids an independent supplier (Luria) from selling to any of certain named buyers (the petitioning mills) and any other possible customer—no matter how small—"all or substantially all" of its requirements of a readily available commodity (iron and steel scrap), even though there is no agreement or conspiracy among the buyers to buy from the supplier, nor any agreement or conspiracy between the supplier and *any* buyer to continue buying, nor any obligation or any economic compulsion on any buyer to do so.

Admittedly, if satisfied buyers continue to purchase from a single seller, the result may be that the seller will have a large percentage of the business—and perhaps all of it. *Luria submits that far from being unlawful, this is pure competition.* As Commissioner Elman pointed out in his vigorous dissent:

> "The so-called exclusive supply arrangements neither restrained the mills' freedom to buy from other suppliers nor foreclosed Luria's rival suppliers from the opportunity to sell to the mills." (App. 109a)

The Court of Appeals held that to allow satisfied buyers acting independently of each other to continue purchasing from one seller, although motivated by sound business judgment in response to different circumstances, "would open a large loophole in our antitrust laws" (App. 22a). *It is submitted that this startling pronouncement is utterly inconsistent with the fundamental policy of the antitrust laws and requires review by this Court.*

Luria does not contest the fact that the mills bought large amounts of scrap from Luria. Apparently, the Federal Trade Commission and the Court of Appeals took this as evidence that Luria is a monopoly or that it intends to monopolize. Neither is the case.

Monopoly means the power to fix prices or to exclude competition. *U. S.* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 389 (1956). *Price fixing was neither charged nor proven.*

As to the power to exclude competitors, the Federal Trade Commission, the examiner, and the Court of Appeals all conceded that *each mill has complete and unrestricted freedom at all times to buy from whomever it pleases.* The wide variation in the percentages purchased from Luria by the mills both on a company-wide basis and among the plants of a single company shows that each mill exercised its freedom.

Indeed, as Commissioner Elman observes, under the Commission's order the mills may now buy all their scrap from a single broker *other* than Luria, and that broker

would then have the business and Luria would not (App. 114a).

Consequently, where is the illegality? Commissioner Elman outlined his difficulties with the majority opinion which he felt "may also be encountered by others, including a reviewing court" (App. 107a). Unable to determine just what theory was used by the majority and the examiner, Commissioner Elman reviewed four possible theories of illegality *and found that the evidence supported none of them.*

A précis of the proceedings adds irrefutable support to this conclusion.

The Commission charged in its complaint that there was a conspiracy among the mills and Luria to make Luria a monopolist in the scrap industry. The Commission further charged that Luria alone and in conjunction with the mills engaged in a host of unfair practices incidental to, and in furtherance of the alleged conspiracy. At the close of the evidence offered by complaint counsel, the examiner dismissed the charge of conspiracy. In addition, the examiner dismissed every single charge of unfair practices. The Commissioner affirmed on both points. The Court of Appeals took note of these dismissals (App. 4a).

Obviously, if these accusations could have been proven, there would have been classic violations of the antitrust laws and the Federal Trade Commission Act.

However, the dismissal of the conspiracy and unfair practice charges stripped the dealings between Luria and its customers of any semblance of illegality. Complaint counsel clearly recognized this when he warned the Federal Trade Commission on oral argument that unless the Commission reversed the examiner on the unfair practice charges, *the Commission would lose the case in the courts* (R. 2680a).

As the Commission noted (App. 55a), the examiner's theory of the illegality was not "crystal-clear." He found that as between Luria and each individual mill, there was an "agreement" for continued supply although he was quick to add:

> "They do not, obviously, have a number of basic features of a normal long-term supply contract, such as a stated term, a specification of the type of scrap involved, specific prices or a price formula provision, terms of payment, etc. *The only binding contracts are the individual orders, after acceptance by Luria,* and the terms of these may vary from order to order." (Emphasis supplied) (R. 2625a)

The examiner further found that the "agreements"

> ". . . were entered into by each of the mills at different times and for different reasons, and were based on economic conditions prevailing in their own areas and individual needs of the particular mills involved." (R. 2389a)

Conceding that the "agreements" did not violate Section 3 of the Clayton Act, the examiner found them an "economic equivalent" to the type of agreement covered by that section. Therefore, he reasoned, the "agreements" violated Section 5 of the Federal Trade Commission Act (R. 2643a).

The FTC majority rejected the examiner's reasoning, but nevertheless seemed to conclude that there were "exclusive agreements", and hence they were unlawful. Commissioner Elman astutely observed that the majority simultaneously rejected and accepted the examiner's Section 3 theory (R. 2757a).

The Commission also spoke of an attempt to monopolize on behalf of Luria. But since the only "evidence" cited was the alleged exclusive agreements, the essential question is still whether completely voluntary arms-length dealing between Luria and its customers is unlawful simply because of the magnitude of the purchases.

The FTC majority underscored the issue by changing the examiner's order so as to prohibit Luria and the mills from dealing exclusively or substantially exclusively even on an order-to-order basis, and *"sans agreement"* as to any future business (See App. 77a). The examiner's order only outlawed such dealings *pursuant to agreement.*

The Court of Appeals affirmed the order in its entirety. Again, the legal theory is vague. Overlooking *"sans agreement"*, the Court cited in support of its position a case in which the essential feature was exactly the opposite—that is, *a definite contractual obligation between the supplier and the customer;* namely, *FTC* v. *Brown Shoe Co.*, 384 U. S. 316 (1965) at 321, in which this Court said:

> "The record in this case shows beyond doubt that Brown, the country's second largest manufacturer of shoes, has a program, which requires shoe retailers, *unless faithless to their contractual obligations* with Brown, substantially to limit their trade with Brown's competitors. This program obviously conflicts with the central policy of § 1 of the Sherman Act and § 3 of the Clayton Act against *contracts which take away freedom of purchasers to buy in an open market."* (Emphasis supplied)

It is because in this case *there are no contractual obligations or any other obligations* whatsoever requiring that Luria and any customer deal with each other that the busi-

ness relations do not infringe what this Court has referred to as "the basic policies of the Sherman and Clayton Acts." *FTC* v. *Brown Shoe Co., loc. cit., supra.*

This point was clearly seen by Commissioner Elman when he said:

> "The arrangements between Luria and the mills were not exclusive in the sense that they tied the mills to a single source of supply. Like a housewife who buys milk for her family regularly and exclusively from a single dairy, *a mill buying scrap from Luria remains free to stop doing so at any time and for any reason.*" (Emphasis supplied) (App. 109a)

It is submitted that the groping for legal theory to sustain the order goes to the heart of the matter.

It reveals the difficulty and injustice of penalizing the successful competitor. Indeed, it is submitted that upon analysis, what the Court of Appeals and the FTC have held is that *bigness resulting from free competition is "unfair" under Section 5 of the Federal Trade Commission Act.* Moreover, every purchaser, no matter how tiny, who buys from a big seller, is also tainted.

For example, petitioner Edgewater's annual purchases from Luria over the ten-year period involved in this case never exceeded .00524 of the scrap purchased in the relevant market (R. 5861-2a).* Nevertheless, the Court of Appeals holds that even this eyedropperful contributes to Luria's size, and therefore, Edgewater has unwittingly committed an unlawful act. On the same logic, *every cus-*

---

*Petitioners Bucyrus-Erie, McLouth, and Detroit Steel did not fit into any of the defined marketing areas (App. 16a). Consequently, there is no way to test the economic impact of purchases by those mills. Undoubtedly, purchasers smaller than Edgewater will be affected because the order bars Luria from acting as exclusive supplier to *any buyer, anywhere, any time.*

tomer—including every member of this Court—might be enjoined from buying a General Motors automobile.

Modernistic Candies v. *FTC,* 145 F. 2d 454 (7th Cir. 1944), is the sole authority cited by the Court of Appeals in support of this proposition (App. 27a). The citation is askew. In that case, the Seventh Circuit agreed that merchandising by the use of gambling devices is unlawful, and not only gamblers, but manufacturers *"who deliberately and designedly aid and abet them"* may also be enjoined. 144 F. 2d 455 (Emphasis supplied).

To equate the manufacturer of gambling devices who *intentionally aids and abets a per se unlawful activity,* with the customer who chooses to buy from the best supplier, is to equate the guilty with the innocent.

Only on the ground of conspiracy among the steel mills would the Court of Appeals have been justified in adding up the innocent purchases of each mill and finding illegality. Though the conspiracy charge was dismissed, its ghost haunts the background and supplies *sub silentio* the theoretical underpinning of the decision.*

Petitioner submits that the importance of the issue in this case is difficult to over-emphasize. Paraphrasing the question presented for review, the issue is whether the likelihood that orders will be given and accepted in the future if relations prove satisfactory, is a course of conduct which henceforth will be unlawful if the seller thereby does a large volume of business.

Luria's relations with its individual customers constituted nothing but the measure of the customers' good will to Luria; namely, a "reasonable expectation that 'the old customers will resort to the old places' ", *Commissioner* v. *Killian,* 314 F. 2d 852, 855 (5th Cir. 1963), and hence, a

*If, for example, the FTC brought this proceeding solely against Edgewater, it is inconceivable that any order would be sustained.

reasonable expectation of what Mr. Justice Brennan in *N. L. R. B.* v. *Brown,* 380 U. S. 278, 284 (1965), called "repetitive patronage."

These words describe exactly the relationship between Luria and its customers and present to this Court for the first time the question whether the likelihood of such patronage constitutes what the Commission and the Court of Appeals have called *not quite* a contract or agreement, but an "arrangement," which *constitutes unfair competition* and violates the Federal Trade Commission Act.

We respectfully submit that if this question is answered in the affirmative and it is held that it is an unfair trade practice for a seller to build up a good will consisting of the hope and realization of repetitive patronage, there is a handcuff put on the ambitions of a competitive businessman which it never was the purpose of the Federal Trade Commission Act to impose.

We respectfully submit that in no other case has the relationship between a seller and a satisfied customer *who is entirely free to take his trade elsewhere at any time for any reason,* been considered an unfair trade practice because the seller has *other* satisfied customers.

CONCLUSION

For the reasons presented, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Morris Wolf
Nathan Silberstein
Burton Caine

WOLF, BLOCK, SCHORR AND SOLIS-COHEN
Twelfth Floor, Packard Building
Philadelphia, Pennsylvania 19102

Attorneys for Petitioner Luria Brothers and Company, Inc.

May 24, 1968

LIBRARY
SUPREME COURT, U. S.

FILED
MAY 24 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. [redacted] 126

OCTOBER TERM 1968

BALDWIN-LIMA-HAMILTON CORPORATION; BETHLEHEM STEEL CORPORATION (as an original party and as successor by merger to Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation); BUCYRUS-ERIE COMPANY; CF&I STEEL CORPORATION (name changed from The Colorado Fuel and Iron Corporation, an original party and successor by merger to John A. Roebling's Sons Corporation); DETROIT STEEL CORPORATION; EDGEWATER STEEL COMPANY; GRANITE CITY STEEL COMPANY; GRINNELL CORPORATION (successor by merger to Columbia Malleable Castings Corporation); LUKENS STEEL COMPANY; McLOUTH STEEL CORPORATION; NATIONAL STEEL CORPORATION; PHOENIX STEEL CORPORATION (successor by merger to Phoenix Iron and Steel Company and Central Iron and Steel Company); UNITED STATES STEEL CORPORATION (with respect to its plant at Geneva, Utah); and WEIRTON STEEL COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARTHUR LITTLETON
ROBERT C. MCADOO
MORGAN, LEWIS & BOCKIUS
2107 The Fidelity Building
Philadelphia, Pennsylvania 19109
Attorneys for Petitioner Baldwin-Lima-Hamilton Corporation

HOWARD M. HOLTZMANN
MARK J. MAGED
HOLTZMANN, WISE & SHEPARD
30 Broad Street
New York, New York 10004
Attorneys for Petitioner CF&I Steel Corporation, name changed from The Colorado Fuel & Iron Corporation, an original party and successor by merger to John A. Roebling's Sons Corporation

ALBERT R. CONNELLY
EDWARD C. PERKINS
JAY E. GERBER
DAVID BOIES
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for Petitioner Bethlehem Steel Corporation, as an original party and as successor by merger to Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation

LESTER S. CLEMONS
QUARLES, HERRIOTT, CLEMONS, TESCHNER & NOELKE
411 E. Mason Street
Milwaukee, Wisconsin 53202
Attorneys for Petitioner Bucyrus-Erie Company

GILBERT W. OSWALD
SAMUEL D. SLADE
SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
Attorneys for Petitioner Lukens Steel Company

JOSEPH A. VIESON
W. ROBERT CHANDLER
CROSS, WROCK, MILLER & VIESON
4200 Penobscot Bldg.
Detroit 25, Michigan
Attorneys for Petitioner Detroit Steel Corporation

C. M. THORP, JR.
JAMES A. BELL
CHARLES WEISS
THORP, REED & ARMSTRONG
Grant Building
Pittsburgh, Pennsylvania 15219
Attorneys for Petitioner Edgewater Steel Company

WILLIAM R. BASCOM
EDWIN S. TAYLOR
BRYAN, CAVE, MCPHEETERS AND MCROBERTS
Boatmen's Bank Building
St. Louis 2, Missouri
Attorneys for Petitioner Granite City Steel Company

RALPH M. BARLEY
BARLEY, SNYDER, COOPER & MUELLER
45 North Duke Street
Lancaster, Pennsylvania 17602
Attorneys for Petitioner Grinnell Corporation, successor by merger to Columbia Malleable Castings Corporation

WILLIAM B. CUDLIP
WILLIAM G. WARREN
DICKINSON, WRIGHT, MCKEAN & CUDLIP
800 First National Bldg.
Detroit 26, Michigan
Attorneys for Petitioner McLouth Steel Corporation

JAMES A. BELL
CHARLES WEISS
ELI KRIVOSHIA, JR.
THORP, REED & ARMSTRONG
Grant Building
Pittsburgh, Pennsylvania 15219
Attorneys for Petitioners National Steel Corporation and Weirton Steel Company

ARNOLD F. SHAW
DONOHUE, KAUFMANN AND SHAW
503 D Street, N. W.
Washington 1, D. C.
Attorneys for Petitioner Phoenix Steel Corporation, successor by merger to Phoenix Iron and Steel Company and Central Iron and Steel Company

L. L. LEWIS
W. H. BUCHANAN
525 William Penn Place
Pittsburgh 30, Pennsylvania
Attorneys for Petitioner United States Steel Corporation, with respect to its plant at Geneva, Utah

INDEX

PAGE

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

A. The Proceedings Below 4

B. The Petitioners 5

C. The Nature of Petitioners' Alleged Violations .. 6

D. Petitioners' Purchases from Luria 9

REASONS FOR GRANTING THE WRIT 11

Summary of Argument 11

I. PETITIONERS' COURSE OF DEALING WITH LURIA DID NOT VIOLATE THE CENTRAL POLICY OF ANY ANTITRUST LAW. THE COURT BELOW THUS HAD NO BASIS FOR HOLDING THAT SUCH A COURSE OF DEALING WAS ILLEGAL UNDER SECTION FIVE OF THE FEDERAL TRADE COMMISSION ACT 13

A. The Legality of Exclusive Dealing as Possible Incipient Violations of the Sherman Act is Governed by the Central Policy of § 3 of the Clayton Act 13

B. Even if the Commission Is Not Bound by the Central Policy of § 3 of the Clayton Act, It Was Still Error for It and Court Below To Hold That Petitioners' Independent Purchases from Luria Violated § 5 As Incipient Violations of the Sherman Act .. 19

PAGE

II. SINCE THE INDIVIDUAL COURSES OF DEALING BETWEEN LURIA AND PETITIONERS WERE LAWFUL, THE COMMISSION AND COURT BELOW HAD NO JUSTIFICATION FOR HOLDING PETITIONERS LIABLE UNDER § 5 ON THE THEORY THAT THE AGGREGATE EFFECT OF SUCH DEALING ENHANCED LURIA'S MARKET POSITION 22

III. SINCE THE COMMISSION AND COURT BELOW COULD DEVISE NO VIABLE LEGAL THEORY TO HOLD PETITIONERS LIABLE UNDER § 5, THE COMMISSIONER'S ORDER AGAINST PETITIONERS MUST BE VACATED 24

IV. THE COMMISSION'S ORDER MUST BE VACATED BECAUSE IT IS BASED ON A STALE RECORD 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES:

American Committee v. *Subversive Activities Control Board*, 380 U. S. 503 (1965) 29

Dictograph Products, Inc. v. *FTC*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied*, 349 U. S. 940 (1955) 17, 18

FTC v. *Brown Shoe Co.*, 384 U. S. 316 (1966) 18, 19, 20

FTC v. *Eastman Kodak Co.*, 274 U. S. 619 (1927) 14

FTC v. *Motion Picture Advertising Service Co.*, 344 U. S. 392 (1953) 18, 19

FTC v. *R. F. Keppel & Bro.*, 291 U. S. 304 (1934) 20

Grand Union Co. v. *FTC*, 300 F. 2d 92 (2d Cir. 1962) 14

Hershey Chocolate Corp. v. *FTC*, 121 F. 2d 968 (3d Cir. 1941) 22

PAGE

Joseph A. Kaplan & Sons, Inc. v. *FTC*, 347 F. 2d 785 (D. C. Cir. 1965) 26

Lawlor v. *National Screen Service Corp.*, 1955 Trade Cas. ¶ 68,216 (E. D. Pa.) 24

Modernistic Candies v. *FTC*, 145 F. 2d 454 (7th Cir. 1944) 23, 24

New Standard Pub. Co. v. *FTC*, 194 F. 2d 181 (4th Cir. 1952) 29, 30

New York v. *United States*, 342 U. S. 882 (1951) 27

NLRB v. *Eanet*, 179 F. 2d 15 (D. C. Cir. 1949) .. 30

NLRB v. *Kingston Cake Co.*, 206 F. 2d 604 (3d Cir. 1953) 27

Standard Oil Co. v. *United States*, 337 U. S. 293 (1949) 17

United States v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S. D. N. Y. 1958) 6

United States v. *Pullman Co.*, 64 F. Supp. 108 (E. D. Pa. 1945), *aff'd*, 330 U. S. 806 (1947) 21

STATUTES:

Federal Trade Commission Act § 5(a)(1), 38 Stat. 719 (1914) as amended, 15 U. S. C. § 45(a)(1) 2, 3, 9, 11, 13-16, 18-20, 22, 24

Clayton Act § 3, 38 Stat. 731 (1914), 15 U. S. C. § 14 ..... 3, 8, 13-16, 18, 19, 25

Sherman Act § 1, 26 Stat. 209 (1890) as amended, 15 U. S. C. § 1 (1964) 3

Sherman Act § 2, 26 Stat. 209 (1890), 15 U. S. C. § 2 4

PAGE

OTHER:

Report of the Attorney General's Committee to Study the Antitrust Laws (1955) 13

51 Cong. Rec. (1914) 15, 16

Handler, *Antitrust Policymaking*, 76 *Yale L. J.* 92 (1966) 13

Oppenheim, *Harmonization of Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 17 *A. B. A. Antitrust Section* 231 (1960) 13

Rahl, *Does Section 5 of the Federal Trade Commission Act Extend the Clayton Act?*, 5 *Antitrust Bull.* 533 (1960) 13

IN THE

Supreme Court of the United States

No. ....

OCTOBER TERM 1967

BALDWIN-LIMA-HAMILTON CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 24, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 389 F. 2d 847. The opinions of the Federal Trade Commission ("the Commission") are reported at 62 F. T. C. 597, 649. The initial decision of the Hearing Examiner is reported at 62 F. T. C. 262.*

*This petition seeks review of the same judgment and order as the petition of Luria Brothers and Co., Inc. ("Luria") in the proceeding styled *Luria Brothers and Co. Inc.* v. *Federal Trade Commission* and is based upon and relies on the same record ("R.") and Appendix ("App.") filed therein. The initial decision of the Hearing Examiner appears at R. 2161a-2668a and has not been reprinted in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1968. Petitioners filed a petition for rehearing en banc on February 6, 1968, and that petition was denied in an order entered February 27, 1968. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

This petition presents four questions common to all petitioners:

1. Did purchasers of the same supplier violate Section 5 of the Federal Trade Commission Act by purchasing a major portion of their requirements of a vital raw material from that supplier

   (a) when decisions to purchase were made freely and independently by each purchaser,

   (b) when each purchaser was motivated solely by its satisfactory experience with the performance of that supplier, and

   (c) when the dealings with that supplier were unilaterally terminable at will by each purchaser?

2. May the purchases of each petitioner, which were entirely lawful standing alone, be declared unlawful on the theory that, in the aggregate, they may have contributed to a possible incipient monopoly?

3. May petitioners be subjected to a prospective order of the Commission in the absence of any specific finding that they violated the law simply because their inclusion in such an order was thought necessary to make the relief sought against a third person more effective?

4. May the Commission properly issue an order materially affecting petitioners' future purchasing practices solely on the basis of market conditions that existed more than 14 years ago?

STATUTES INVOLVED

Federal Trade Commission Act § 5(a)(1), 38 Stat. 719 (1914) as amended, 15 USC § 45(a)(1):

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

Clayton Act § 3, 38 Stat. 731 (1914), 15 USC § 14:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Sherman Act § 1, 26 Stat. 209 (1890) as amended, 15 USC § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

among the several States, or with foreign nations, is declared to be illegal . . . ."

Sherman Act § 2, 26 Stat. 209 (1890), 15 USC § 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

A. The Proceedings Below

The proceedings in this case were instituted by a complaint filed by the Commission on January 19, 1954, which was amended on July 13, 1954, and April 16, 1956 (R. 15a-43a). The principal evidence submitted covers the years 1945 through 1954. The record was closed in 1958. The Hearing Examiner's Initial Decision was filed on March 29, 1961 (R. 2161a-2668a), and the Commission's decision affirming was filed on November 15, 1962 (App. 40a-115a). Chairman Dixon and Commissioner Anderson constituted the majority, Commissioner Elman dissented, and Commissioners McIntyre and Higginbotham did not participate. The Commission's order was entered on February 13, 1963 (App. 116a-121a). On April 11, 1963, petitioners appealed to the United States Court of Appeals for the Third Circuit ("the court below") to review and set aside that order. The court below entered its judgment on January 24, 1968 (App. 1a-33a). On February 6, 1968, petitioners petitioned for rehearing en banc, which was denied on February 27, 1968.

B. The Petitioners

Petitioners are engaged in one form or other in the production and manufacture of steel products. Certain petitioners (Bethlehem, Phoenix, CF&I, Detroit, Granite City, McLouth, U. S. Steel and Weirton) are fully integrated steel companies, *i.e.*, they produce pig iron and also operate facilities for the production of semifinished and finished steel from ingots. Other petitioners (Edgewater and Lukens) are semi-integrated steel companies which do not operate blast furnaces but do produce ingots and have finishing facilities. Petitioners Baldwin-Lima-Hamilton, Bucyrus-Erie and Columbia Malleable operate iron or steel foundries to supply their own manufacturing and fabricating operations (App. 42a-43a).

Luria, which is filing a separate petition for certiorari, is a seller of iron and steel scrap.

Petitioners purchased scrap for use as a raw material in the production of new steel.* However, petitioners are by no means the only or even the major consumers of scrap. The Commission found that petitioners' scrap purchases represented in the aggregate only approximately 22% of the total scrap received by all domestic scrap consumers (App. 43a). Among the large integrated steel companies which also purchase scrap but which are not parties to this proceeding are Republic Steel Corporation, Jones & Laughlin Steel Corporation, The Youngstown Sheet and Tube Company, Armco Steel Corporation, Inland Steel Com-

*Most steel producers use scrap which is generated as a waste product from their own production activities and which is referred to as "home scrap". Their remaining requirements must be purchased from outside sources and is referred to as "purchased scrap". The quantity of purchased scrap which a steel producer will need is determined by a wide variety of factors including the availability of home scrap, the availability and relative cost of pig iron, the desired chemical content of the steel to be produced, the type of furnace to be charged and the level of steel production (R. 1989a-1992a).

pany, Wheeling Steel Corporation, Sharon Steel Corporation, Kaiser Steel Corporation, Pittsburgh Steel Company and Crucible Steel Company of America. *See United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S. D. N. Y. 1958). In addition, petitioners include only three of the total of some 3,000 companies which operate iron or steel foundries (App. 67a-68a). United States Steel Corporation, which had 31% of the nation's ingot capacity as of 1954 (R. 2307a-2308a), is a party only in respect of its plant at Geneva, Utah, which accounted for approximately 1½% of such capacity.

C. The Nature of Petitioners' Alleged Violations

The Commission's primary purpose in bringing this proceeding was, in its words,

> ". . . to arrest in their incipiency acts and practices which, if allowed to continue, would eventually produce a monopoly in the respondent Luria. . . . The potential monopolizer at which the complaint is primarily aimed is respondent Luria." (App. 45a-47a).

The Commission's charges against petitioners were interpreted by the Hearing Examiner to consist of,

> (1) a charge of conspiracy among them and Luria to create a monopoly in Luria in the sale of steel scrap; and
>
> (2) a charge that the separate and independent dealings between each petitioner and Luria constituted illegal exclusive dealings.

With respect to the first charge, the Hearing Examiner dismissed the complaint at the end of the case-in-chief on the ground that,

> " . . . the record does not establish the existence of any overall agreement, conspiracy, understanding, or combination among the respondent steel companies or any other steel companies . . . to deal with the Luria respondents . . ." (R. 1979a; see also R. 2198a).

The Commission affirmed that dismissal.

> "There is no substantial evidence to support an inference that the mill respondents ever came to an expressed or tacit meeting of the minds or understanding as to purchasing from Luria." (App. 55a).

With respect to the second charge, *i.e.*, that the dealings between each petitioner and Luria constituted illegal exclusive dealings, the Hearing Examiner found that the relations between each petitioner and Luria,

> " . . . cannot be classified as legally binding contracts. They do not, obviously, have a number of the basic features of a normal long-term supply contract . . . The only binding contracts are the individual orders, after acceptance by Luria, . . . the terms of these may vary from order to order. . . . [and] the relationships are terminable at will. . . ." (R. 2625a).

He found, nevertheless, that these relationships were "arrangements" to deal exclusively with Luria, and that,

> " . . . the principal factor in Luria's rise in recent years has been the series of exclusive arrangements which it has had with a number of the domestic mills. It is these arrangements at which the complaint is primarily directed. . . . Pursuant to these arrangements a number of the mills have bought substantially all of their scrap from Luria and its subsidi-

> aries, while others have bought from the Luria organization substantially all of their brokerage scrap, such scrap constituting the bulk of their scrap purchases in most instances". (R. 2621a).

From that premise, the Hearing Examiner concluded that,

> ". . . Since the arrangements between Luria and the mills are of the type covered by Section 3 [of the Clayton Act] or are at least economically equivalent thereto . . . the buyers may be held accountable under Section 5 of the Federal Trade Commission Act . . ." (R. 2643a).

The Commission considered the exclusive dealing charge as "directed against incipient Sherman Act violations" (App. 55a) rather than violations of § 3 of the Clayton Act, as the Hearing Examiner had concluded (R. 2702a). The two-man majority decided,

> ". . . that there exists between Luria and each mill respondent an agreement, understanding, combination and conspiracy pursuant to which Luria supplies each of the mills with all or substantially all of its needs of scrap. The effect of these arrangements is to exclude competing scrap sellers from a substantial market and thus each of the agreements constitutes an unlawful conspiracy". (App. 59a-60a).

A further reason for the joinder of petitioners to these proceedings was, in the Commission's words,

> ". . . . because an order to cease and desist which did not include mill respondents would be ineffective." (App. 47a-48a).

On those bases, the Commission issued an Order (App. 116a-121a):

> (a) prohibiting each petitioner from
>
> (i) purchasing all or substantially all of the annual scrap requirements of any plant or plants from Luria, and
>
> (ii) giving Luria preferred status or treatment; and
>
> (b) directing each petitioner, for five years, to purchase from suppliers other than Luria at least 50% of the annual requirements of any plant or plants for purchased scrap, except to the extent that adequate supplies are not available from other suppliers on comparable terms.

The court below, in affirming the Commission's order, adopted the Commission's rationale that the charges against petitioners were directed against possible incipient Sherman Act violations by Luria (App. 18a, 21a).

> "[The Commission's purpose in the instant proceeding] was to open the market to Luria's competitors who consist of other broker-dealers whose economic livelihood is directly affected by the size of the market freed from monopolistic control." (App. 17a).

The court below held that petitioners violated § 5,

> "... by separate agreements whereby each mill made Luria its exclusive or substantially exclusive broker." (App. 4a).

D. Petitioners' Purchases from Luria

As of 1954 (the most recent year for which the record affords full information), each petitioner, with a single ex-

ception, dealt with Luria solely on the basis of individual purchase orders without any contract or other commitment to continue to make such purchases (R. 2625a).* Such course of dealing was completely "terminable at will". *Ibid.*

Petitioners, in dealing with Luria, followed practices almost as varied as their number. Dealings between each petitioner and Luria differed not only from company to company but also from plant to plant within a single company. There was also a wide variation in the percentage of scrap which each petitioner purchased from Luria.

For example, Bethlehem's five eastern plants purchased only 50.9% of their scrap from Luria in 1954 but such purchases consisted of over 845,000 tons (R. 5629a). Edgewater, Baldwin-Lima-Hamilton, Detroit, Phoenix and Columbia Malleable, on the other hand, purchased over 95% of their scrap from Luria in 1954, but their purchases from Luria in tons were but a small fraction of Bethlehem's total (R. 5651a, 5621a, 5650a, 5625a, 5649a). One Bucyrus-Erie plant purchased substantially all of its scrap from Luria, a second plant approximately 50%, while a third plant, which consumed more scrap than the other two combined, purchased less than .05% of its scrap from Luria (R. 5640a-5642a).

Each petitioner has had a satisfactory experience with Luria in terms of quality of scrap, adherence to delivery schedules and general effectiveness as a broker. The record is replete with uncontradicted testimony that each petitioner

---

*The only exception was a partial requirements contract entered into between Bethlehem and Luria in connection with the construction and equipping of a scrap preparation yard adjacent to Bethlehem's Los Angeles plant (R. 5181a-5181a-8). That contract expired on February 12, 1963. CF&I entered into a five-year contract with Luria with respect to its plant at Pueblo, Colorado, but that contract was terminated the following month (R. 5168a, CX 192, 2293a-2296a).

dealt with Luria because each was completely satisfied with its performance.*

REASONS FOR GRANTING THE WRIT

Summary of Argument

This case raises important questions respecting the basic power of the Commission and the fundamental fairness of its procedure. The Commission and court below have rendered a decision which, in part, conflicts with decisions of this Court and several courts of appeals on the same subject matter and which, in part, raises important and novel questions of federal law which have not been, but should be, settled by this Court. Moreover, the procedure and methods adopted by the Commission, and affirmed by the court below, represent such a departure from the accepted and usual course of an administrative proceeding as to make necessary the exercise of this Court's power of supervision.

The Commission and court below have held that petitioners are liable under § 5 because they purchased scrap from Luria. It is clear, however, that such purchases were made by each petitioner because, in the independent judgment of each, Luria gave the best performance. It is also clear that petitioners were neither contractually bound to Luria, nor economically coerced to purchase from Luria, nor were engaged in a conspiracy to purchase from Luria.

---

*See, for example, the testimony of Bethlehem's purchasing agent, quoted by the hearing examiner (R. 2259a) that Bethlehem selected Luria because it was "the most satisactory performer" (R. 386a). To the same effect, see testimony concerning Phoenix (R. 882a); Lukens (R. 903a, 909a); Baldwin-Lima-Hamilton (R. 940a); Columbia Malleable (R. 978a-980a); Bucyrus-Erie (R. 1403a); Granite City (R. 5916a); Detroit (R. 1272a-1273a, 1247a, 1281a); Edgewater (R. 1353a, 1359a); National (R. 1404a); CF&I (R. 1471a-1473a, 2062a-2063a, 2065a-2066a); U. S. Steel (R. 2133a); and McLouth (R. 1445a).

In no previous case under any antitrust law has liability been imposed on purchasers who, independently and without collusion, bought a good part of their requirements from the same supplier. Nor has liability ever been imposed as a result of exclusive dealing which, on the purchaser's part, was entirely voluntary and terminable at will.

Moreover, the Commission and court below erred in declaring the perfectly lawful individual purchases of each petitioner unlawful because of their effect in the aggregate on Luria's market position. Petitioners did not agree, combine or conspire to make Luria their exclusive supplier. There is, therefore, no basis to impose liability on all petitioners as a class. Certainly petitioners' purchases contributed to Luria's size, but so did the purchases of Luria's other customers. In no previous case under any antitrust law have purchasers been held liable on the theory that their wholly independent and otherwise lawful purchasing practices contributed to an alleged incipient monopoly.

Moreover, in the absence of any specific act or practice which even remotely could be classified as being illegal, the Commission and court below were in error to include petitioners in a prospective order against Luria—thus circumscribing their business freedom—simply because such inclusion might make a possible order against Luria more effective.

This disregard for petitioners' rights is even more shocking upon a consideration of the terms of the order which the Commission entered and the court below sustained. That order is unduly vague, and, in its application to some petitioners, is punitive. Nor does it appear that the order is even relevant today. The evidence upon which it is based is now over 14 years old and can hardly be characterized as being "reasonably current". Substantial changes have occurred in both the steel and scrap industries while this case was being litigated, yet, the record before

this Court contains not one iota of evidence about the effect of those changes on present competitive conditions, or the possible effect that the Commission's order will now have.

For these reasons the judgment and order of the Commission and court below, the novel questions of federal law and the clear departures from prior practice upon which they are based, should be reviewed by this Court.

I

PETITIONERS' COURSE OF DEALING WITH LURIA DID NOT VIOLATE THE CENTRAL POLICY OF ANY ANTITRUST LAW. THE COURT BELOW THUS HAD NO BASIS FOR HOLDING THAT SUCH A COURSE OF DEALING WAS ILLEGAL UNDER SECTION FIVE OF THE FEDERAL TRADE COMMISSION ACT.

A. The Legality of Exclusive Dealing as Possible Incipient Violations of the Sherman Act is Governed by the Central Policy of § 3 of the Clayton Act.

The legality of exclusive dealing as they may constitute possible incipient violation of the Sherman Act is expressly governed by the central policy of § 3 of the Clayton Act. Logic, precedent and the relevant legislative history of the statutes involved make clear that the policy of § 3 supersedes the vague language of § 5 with respect to exclusive dealing arrangements.*

See, e.g., Handler, *Antitrust Policymaking*, 76 Yale L. J. 92, 95 (1966):

". . . Congress, after mature and careful deliberation in 1914, was unwilling to leave the legality of exclusives to the uncontrolled discretion of the Federal Trade Commission, but specifically legislated on the problem in Section 3."

See also Report of the Attorney General's Committee to Study the Antitrust Laws 148 (1955); Oppenheim, *Harmonization of Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 17 *A. B. A. Antitrust Section* 231, 257 (1960); Rahl, *Does Section 5 of the Federal Trade Commission Act Extend the Clayton Act?*, 5 Antitrust Bull. 533 (1960).

In *FTC* v. *Eastman Kodak Co.*, 274 U. S. 619 (1927), this Court expressly considered the extent to which the specific policy of the Clayton Act limits the Commission's discretion under § 5. The Commission found that Kodak's acquisition of the assets of three film laboratories violated § 5 and ordered divestiture. The Court held that since § 7 of the Clayton Act, which governed the legality of acquisitions, did not then provide for the divestiture of acquired assets, as opposed to stock, the Commission lacked power to attack an acquisition of assets under § 5.

The principle of *Kodak* was recently considered and followed in *Grand Union Co.* v. *FTC*, 300 F. 2d 92 (2d Cir. 1962). The issue in *Grand Union* was whether § 5 could be used to prohibit a buyer from knowingly participating in practices condemned by section 2(d) of the Robinson-Patman Act even though 2(d) by its terms applies only to sellers.

The court recognized that § 5 authorized the Commission to arrest in their incipiency practices which might violate the policy of the Clayton Act and to apply Clayton Act proscriptions to parties not subject to the Act if the Congressional omission was "inadvertent" and not intentional. But the Court emphasized that where a practice is of the general type covered by the Clayton Act, § 5 could not be used to prohibit what Congress has studiously and purposefully sanctioned. As an example, the court stated that the Commission had no power under § 5 to prohibit exclusive dealing arrangements that were not prohibited by § 3 of the Clayton Act (300 F. 2d at 98).

Grand Union thus accords with the holding in *Kodak* that the Commission is not free to formulate legislative policy by "legislating a 'new antitrust prohibition' ". *Ibid.* The Commission may, in its discretion under § 5, attack anticompetitive practices before their impact is full blown,

and may, in certain cases, prohibit additional parties from engaging in the proscribed behavior, but it cannot rewrite the law enacted by Congress.

This distinction is important. The Commission's administrative expertise can profitably be employed to ascertain when a practice's effects are likely to result in a violation of law. On the other hand, the determination of whether any particular practice should be subject to proscription involves the balancing of many conflicting social policies for which the broad viewpoint and investigatory power of Congress is necessary.

In the present case, the Commission has departed from the express terms and basic policy of § 3 in two respects. First, the Commission has held petitioners liable even though § 3 applies only to suppliers. Second, the Commission has attacked petitioners' purchases from Luria even though each petitioner was contractually and economically free to terminate them at any time. While § 5 admittedly is broad, it is not so broad that it authorizes the Commission to legislate a new substantive antitrust violation.

Prior to this case, no court has ever imposed liability upon a purchaser who may have engaged in exclusive dealing (absent a horizontal conspiracy). This result was so because Congress clearly intended § 3 to apply only to suppliers. During the debates on § 3, Senator White declared:

> "The Senator from Mississippi asks why I exclude . . . the purchaser, lessee or licensee. In the first place, the section is to protect the purchaser, the lessee, or the licensee, and we do not care to punish the man we are intending to protect." 51 Cong. Rec. 14599 (1914).

Can the legislative history of § 3 now be ignored and the Commission be permitted, simply by evoking the magic

words "Section 5", to impose liability where Congress has purposefully and studiously elected not to impose liability? And if so, how far does its power extend? Are there any mitigating circumstances to such liability? The court below dismissed petitioners' argument that their valid business purpose was a defense. Does this mean that every industrial consumer who may purchase exclusively from one supplier violates § 5?

The imposition of liabilty upon buyers opens new areas of confusion and uncertainty in our antitrust laws which this Court should examine and clarify.

This case is also the first in which liability has been imposed with respect to alleged exclusive dealing which was not founded upon contract or induced by economic coercion. The central policy of § 3 is to protect the freedom of purchasers to shift their patronage at any time, and the vice condemned is not the *practice* of dealing exclusively, but the *compulsion* to do so. Indeed, the right of purchasers to deal freely with the supplier that provides the best offer and service is the very essence of competition. By restricting such freedom, the Commission and court below actually frustrate the policy of § 3.*

---

*This is clear from the legislative history of § 3. Thus, Congressman Floyd, a member of the House Judiciary Committee which reported out the bill subsequently enacted as § 3, gave as an example of illegal exclusive dealing the situation where,

> ". . . a manufacturer goes to a merchant in a town and agrees with him that . . . he will handle his goods exclusively and enter into a contract that he will not handle the goods of any other competitor in his line of business . . . ."

but noted that,

> ". . . unless he makes this exclusive contract there is nothing to prevent a manufacturer dealing exclusively with one person or one person dealing exclusively with one manufacturer." 51 Cong. Rec. 9161 (1914).

The right under the antitrust laws to deal exclusively in the absence of contractual compulsion or economic coercion has been repeatedly affirmed. In *Standard Oil Co.* v. *United States,* 337 U. S. 293 (1949), for example, this Court expressly recognized the right of purchasers to deal exclusively with a single supplier so long as there was no barrier which prevened them from turning at any time to a competing supplier. This Court carefully explained:

> ". . . If in fact it is economically desirable for service stations to confine themselves to the sale of the petroleum products of a single supplier, they will continue to do so though not bound by contract, and if in fact it is important to retail dealers to assure the supply of their requirements by obtaining the commitment of a single supplier to fulfill them, competition for their patronage should enable them to insist upon such an arrangement without binding them to refrain from looking elsewhere." 337 U. S. at 313-314.

Applying the same principle in *Dictograph Products, Inc.* v. *FTC,* 217 F. 2d 821 (2d Cir. 1954), *cert. denied,* 349 U. S. 940 (1955), the Second Circuit wrote:

> "It may well be that, after the removal of the prohibited clauses, many if not most of petitioner's distributors will voluntarily prefer to deal exclusively with the 'Acousticon' hearing aid and its parts and accessories. If it possesses the virtues extolled by the petitioner's witnesses, there would seem to be sound business reasons for believing that this will be so. But if others, whose clientele may not be composed of so many people of means, desire to take on the products of other manufacturers which command a lower price, even if not of so superior a quality in

> appearance or performance, and also to sell used instruments which have been traded in or otherwise obtained, the result will be the very result intended by the framers of the statute." 217 F. 2d at 829.

The Commission and court below ignored these authorities, and again, allowed the magic words "Section 5" to become the progenitor of a new substantive antitrust violation.

In so doing, the court below relied heavily on this Court's decisions in *FTC* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392 (1953) (*"MPAS"*), and *FTC* v. *Brown Shoe Co.*, 384 U. S. 316 (1966). Neither of those decisions, however, is apposite.

In *MPAS*, this Court held that exclusive dealing arrangements might violate § 5 even if they related to bailments and not to the "lease, sale or contract for sale" covered by § 3. This Court also suggested that the Commission could reach under § 5 practices which violated the policy of § 3 but which were sufficiently incipient not to constitute a substantial lessening of competition or a tendency towards monopoly. That latter suggestion was the basis for this Court's decision in *Brown Shoe* that exclusive arrangements were not free from attack under § 5 merely because the standards of *competitive impact* of § 3 had not yet been met.

Neither decision, however, suggests that the Commission might, as here, formulate new policies and prohibit activities fully consistent with the purposes of § 3. As this Court recognized in *Brown Shoe*, the "central policy" of § 3 is to prohibit "contracts which take away freedom of purchasers to buy in an open market". 384 U. S. at 321. In both *MPAS* and *Brown Shoe*, the Commission was attacking those kinds of contracts. In *MPAS* the bailees were bound for five years not to accept films from other suppliers.

In *Brown Shoe* there were contracts limiting retailers from purchasing from other suppliers and economic coercion to deal exclusively by Brown Shoe's economic power and threats to withdraw benefits. On such facts, the exclusive arrangements clearly violated the "central policy" of § 3; accordingly, § 5 could properly be employed even though a bailment rather than a sale was involved and even though the competitive impact of the arrangement was not yet full blown.

Both *MPAS* and *Brown Shoe* are thus fully consistent with the rule that § 3 furnishes the basic guidelines as to the kinds of exclusive dealing arrangements that may be considered unlawful under § 5. Nothing in *MPAS* or *Brown Shoe* supports the the Commission's present attempt to employ the incantation "Section 5" to depart from the basic framework of § 3.

The Commission's exercise of legislative power was not only improper, but unwise. In sanctioning such exercise of power the court below erred. In doing so it disregarded the legislative history and policy of § 3 as well as the decisions of other circuits. The novel principle which it announced threatens to unsettle important rights not only of petitioners but of many others similarly situated and to create confusion of untold magnitude. A writ of certiorari should issue to permit this Court to fully review the scope and implications of the new substantive liability which the Commission and court below have created.

B. Even if the Commission Is Not Bound by the Central Policy of § 3 of the Clayton Act, It Was Still Error for It and Court Below To Hold That Petitioners' Independent Purchases from Luria Violated § 5 As Incipient Violations of the Sherman Act.

The court below concluded that petitioners' independent and uncoerced purchases contributed to Luria's al-

leged incipient monopoly and hence violated § 5. As already noted, no court has ever gone so far in permitting the Commission to protect competitors at the expense of competition. See *FTC* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 313 (1934). The central policy of the Sherman as well as the Clayton Act is the protection of freedom to shift patronage at will. *FTC* v. *Brown Shoe Co., supra,* at 321. It is undisputed that petitioners in fact retained that freedom. It is the Commission by its proposed order, rather than Luria, which seeks to take away that freedom.

"Restraint of trade" presumes that someone's freedom to trade competitively has been restricted. Since petitioners remain free to deal with whomever they choose, shifting either part or all of their patronage at any time, no restraint of free trade could possibly result. Nor does the Commission or court below suggest how such a course of dealing might result in a trade restraint in the future.

Equally troubling is the Commission's assertion of an incipient monopoly. The Commission asserted that Luria has "the power to exclude . . . competitors from the market which the mill respondents constitute." (App. 74a) Without further elaboration the Commission asserted,

> "While this monopoly power may exist, as the mill respondents contend, at their sufferance, it is nonetheless monopoly power and unlawful." *Ibid.*

Monopoly in the air is not enough. The essence of monopoly power is the power to control prices and exclude competitors in a given market. The market with which the Commission was concerned involved the mills on the one hand and scrap broker-dealers on the other. A seller's alleged monopoly which exists "at the sufferance" of his customers is no monopoly at all. Nor would petitioners have any business interest to serve by entering into agreements

giving their supplier monopoly power. Yet, regardless of their intent, it is impossible that the courses of dealing here considered could confer such power. Any attempt by Luria to raise prices could be defeated by a shift of patronage. And with petitioners always free to deal with whomever they choose, Luria could not effectively control entry into the market. In *United States* v. *Pullman Co.*, 64 F. Supp. 108 (E. D. Pa. 1945), *aff'd*, 330 U. S. 806 (1947), the court was concerned with the appropriate relief to grant after having found Sherman Act violations. The court emphasized:

> ". . . If there is only one store in a town at which everyone trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable. So here. If the railroads who are the ones responsible for providing sleeping car service can take or leave Pullman assistance to that end, there is no objection to the fact that most of them may prefer to employ the Pullman concessionaire." 64 F. Supp. at 112.

In holding to the contrary, the court below affirmed the Commission's attempt to protect Luria's competitors from the very competition that the Sherman Act was intended to preserve. It also created novel doctrine which this Court should review and clarify.

II

SINCE THE INDIVIDUAL COURSES OF DEALING BETWEEN LURIA AND PETITIONERS WERE LAWFUL, THE COMMISSION AND COURT BELOW HAD NO JUSTIFICATION FOR HOLDING PETITIONERS LIABLE UNDER § 5 ON THE THEORY THAT THE AGGREGATE EFFECT OF SUCH DEALING ENHANCED LURIA'S MARKET POSITION

The Commission and court below concluded that, irrespective of the legality and competitive effect of each independent course of dealing between each petitioner and Luria, the competitive effect of all them in the aggregate justified the imposition of liability against petitioners under § 5 because they contributed to and enhanced Luria's alleged incipient monopoly.

This was sheer error. Each petitioner's course or dealing with Luria was not illegal standing alone. They thus do not suddenly become illegal because of their aggregate effect on Luria's market position. The single case cited by the Commission in the court below to support this novel principle of "liability through aggregation", *Hershey Chocolate Corp.* v. *FTC,* 121 F. 2d 968 (3d Cir. 1941), involved a horizontal conspiracy. Here the Commission has expressly found that a horizontal conspiracy was not present.

In the absence of any conspiracy or concerted action among petitioners, there is no legal justification whatever to impose liability on petitioners because of the aggregate effect of their purchases. If petitioners violated the law because their purchases, however small, had the effect of enhancing Luria's market position, then under this theory, all of Luria's customers should be held to violate § 5 because their purchases also enhanced Luria's market position and contributed to its alleged incipient monopoly.

Consider, for example, the purchases of petitioner CF&I. Because of the location of its plant in Pueblo,

Colorado, the only steel mill in the area, CF&I dealt with Luria because Luria was the only broker that was willing to service its scraps needs. (R. 2293a).

Consider also the purchases of Petitioner Edgewater. Its annual purchases from Luria never exceeded .005% of the scrap purchased in its relevant market (R. 5861a-5862a). Nevertheless, the court below held:

> "We cannot separately view individual purchases by those mills whose annual requirements are not quantitatively significant. All contribute to the unlawful result and all should share in the consequences [citing *Modernistic Candies* v. *FTC*, 145 F. 2d 454 (7 Cir. 1944)]". (App. 27a).

On the same logic, every industrial consumer might be liable for buying a product manufactured by Alcoa or United Shoe Machinery. Is it now illegal for any consumer to purchase from an alleged monopolist or an alleged incipient monopolist? Is it now incumbent upon a consumer to find out (and in the process perhaps violate other antitrust laws) how many other buyers are purchasing from his supplier?

In *Modernistic Candies* v. *FTC*, 145 F. 2d 454 (7th Cir. 1944), the only authority cited by the court below for this novel proposition, the court found that the merchandising of "ballgum boards" constituted gambling activity and held that the Commission could enjoin the manufacturers and distributors of such devices since such parties "deliberately and designedly aid and abet . . . practices contrary to public policy." (145 F. 2d at 455). By citing this case, is the court below suggesting that a customer who buys a good part of his scrap requirements from the best and most reliable supplier is *in pari materia* with a manufacturer of gambling devices?

That *Modernistic Candies* is the only authority cited by the court below to sustain the inclusion of petitioners in this proceeding is revealing. Contrary to the decision below, at least one federal court has said:

> "... I do not think that it has ever been held that merely having business dealings with a monopolist, even with knowledge of the existence of the monopoly, is sufficient to convict anyone of a violation of the [Sherman] Act. Ordinary suppliers and customers are not compelled to boycott a monopolistic business under pain of prosecution." *Lawlor* v. *National Screen Service Corp.*, 1955 Trade Cas. ¶ 68,216 at 71,008 (E. D. Pa).

Lawlor is particularly apposite for there, as here, customers of an alleged monopolist were joined as defendants on the theory that their purchases contributed to the alleged monopoly and the complaint was dismissed as to them.

The decision below thus expounds novel law. A writ of certiorari should issue so that this Court may correct or at least clarify the outer limits of such a manifest departure from prior practice.

III

SINCE THE COMMISSION AND COURT BELOW COULD DEVISE NO VIABLE LEGAL THEORY TO HOLD PETITIONERS LIABLE UNDER § 5, THE COMMISSION'S ORDER AGAINST PETITIONERS MUST BE VACATED.

It is axiomatic that petitioners cannot be found to have violated § 5 simply because the Commission says so. The

Commission has been given broad discretion; but it has not been, and could not be, given unbridled discretion to impose liabilty and enter an order without first establishing that there has been a violation of law.

In the present case any certainty concerning what the Commission's decision means is lacking and has not been clarified by the court below. The Commission has asserted that petitioner's activities contribute to an incipient monopoly and restraint of trade. But as to how or why the independent, uncoerced and freely terminable purchasing practices here challenged could cause such monopoly or restraint of trade, the Commission was silent. Similarly, the Commission gives no indication why it disregards the apparent expression of congressional intent in § 3. In his dissenting opinion Commissioner Elman accurately observed,

> "A major problem with the majority opinion, as I read it, is that one cannot be sure of the precise theory on which the case is being decided. Like the complaint, the opinion is liberally sprinkled with references to 'agreements', 'understandings', 'combinations', 'conspiracies', 'unfair practices', 'incipient monopoly', 'exclusive dealing arrangements', and other familiar antitrust war-horses. But—and it may be that this is a subjective reaction that will not be shared by others—in the majority opinion these old and faithful warriors seem not to be marching progressively in a straight and unwavering line towards a clearly defined objective but to be rambling over the field, moving uncertainly in several loosely-drawn lines and in various different directions at the same time. As a result, one cannot speak with absolute assurance of the theory of the majority opinion." (App. 108a).

As Commissioner Elman recognizes, an ultimate conclusion ("unfair competition") cannot be supported merely by equally conclusional findings of "conspiracies", "incipient monopoly", and "exclusive dealing arrangements".

Thus, in the absence of any viable finding of liability, the Commission's order cannot stand. That petitioners' presence in this proceeding may make a possible order against Luria more effective offers no justification for abridging their business judgment and freedom.* Moreover, such an assertion of power squarely conflicts with the very bases of our democratic and constitutional government. Justice Douglas has timely warned,

---

*The manifest injustice of enforcing the Commission's order against petitioners without a viable finding of liability becomes even more apparent upon a consideration of its terms. The order compels each petitioner not to purchase more than 50% of the scrap requirements of any of its plants from Luria for a period of 5 years. The 50% requirement has no justification in the record, is not related to the alleged unlawful practices found to exist, works an undue hardship on those petitioners which, because of their location, cannot find suitable alternative suppliers and represents a novel departure from any other order ever entered by the Commission.

The order also prohibits each petitioner from making Luria its "exclusive or substantially exclusive" scrap supplier. This prohibition is unreasonably vague. Because of the wide disparities in the purchasing practices of each company, even on a plant to plant basis, it is impossible to ascertain exactly what the Commission means by "exclusive or substantially exclusive".

In refusing to compel the Commission to clarify its order, the court below said: "The order, *when interpreted in light of the record,* is clear and not subject to attack. . . ." (App. 25a) (Emphasis supplied). This massive and jumbled record only adds confusion, not clarity, to the meaning of the order. For the court below to require petitioners to obtain advice under the Commission's Rules of Practice (App. 25a, 26a) will simply require petitioners to submit to the demands of the Commission under risk of contempt. It was precisely for this reason that this approach was flatly rejected in *Joseph A. Kaplan & Sons, Inc.* v. *FTC*, 347 F. 2d 785, 788-791 (D. C. Cir. 1965), a decision cited to but ignored by the court below. The decision below thus conflicts with a decision of another circuit.

> "Unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty." *New York* v. *United States,* 342 U. S. 882, 884 (1951) (dissenting opinion).

IV

THE COMMISSION'S ORDER MUST BE VACATED BECAUSE IT IS BASED ON A STALE RECORD.

The court below had the responsibility not only to affirm or set aside the order of the Commission, but also to determine whether to exercise its equity powers and "issue its own order" of injunction. *NLRB* v. *Kingston Cake Co.,* 206 F. 2d 604, 611 (3d Cir. 1953). Courts of equity have steadfastly refused to issue injunctive orders on the basis of stale evidence. The evidence in this case covers mainly the period 1945 to 1954 and the market statistics cover only the years 1947 to 1954. After 14 years, such evidence is obviously too stale to support a prospective order.

This fact was first recognized by Commissioner Elman when he stated in his Dissenting Opinion (written in 1962):

> ". . . the Commission's order, based as it is upon events of nearly a decade ago, has little relevance to present conditions in the scrap market. As already noted, the period covered by the complaint was a sellers' market in which the mills had a clear interest in purchasing through a single broker. It is common knowledge that in recent years, however, the steel industry has been characterized by produc-

> tion falling far short of capacity. Whether, and how, this has affected the competitive situation today in the market for scrap is something on which the record sheds no light. And, similarly, the extent to which elimination of Luria's 'monopolistic' position (assuming it still exists today) in the scrap business will have practical benefits for the public is a matter for conjecture." (App. 114a-115a).

Commissioner Elman's comments are even more cogent today, after an additional six years have passed.

The court below, however, brushed aside the obvious staleness of this record with the comment: "We have before us a thorough exposition of the *permanent* conditions in the scrap brokerage industry" (App. 33a) (Emphasis supplied). This was sheer error. While the economic and technological conditions of any industry rarely remain "permanent" over a 13 to 22-year period, the changes that have occurred in the steel and scrap industries since 1954 are especially striking. Since 1954, the unique seller's market that existed during the Korean War has changed, competition from foreign production has increased, and steel making itself has changed. The most notable change has been the increased use of the basic oxygen furnace, which has resulted in a lessened need and hence market for scrap. Indeed, Commissioner Elman in a footnote to his Dissenting Opinion cited authoritative statistical evidence to demonstrate certain broad market changes which have occurred in the steel industry since 1954 and which he called a matter of "common knowledge" (App. 115a). However, the record contains no inkling of what effect such changes have had on competitive conditions in the scrap market, or of what effect the Commissioner's Order will have in today's market.

Particularly where, as here, an unusually harsh and sweeping order is entered, the Commission and the courts have a particular responsibility to determine whether present conditions require it.

This Court recently held that a prospective order of an administrative agency must be based on a "reasonably current" record. *American Committee* v. *Subversive Activities Control Board,* 380 U. S. 503 (1965). Other courts of appeal have consistently refused to issue orders of enforcement under circumstances less aggravated than those of the present case. Thus in an opinion vacating an FTC order, the Fourth Circuit held:

> "It appears that the order before us was entered twelve years after the proceedings before the commission were commenced and more than six years after the last evidence was taken therein. It was entered more than ten years after the transactions disclosed by the evidence . . . upon which the proceeding was largely based. . . .
>
> "Under these circumstances, we think it clear that the order of the commission should be vacated. Such orders are entered, not as punishment for past offenses, but for the purpose of regulating present and future practices. 15 U.S.C.A. § 45 (a)(b); American Chain & Cable Co. v. Federal Trade Comm., 4 Cir., 142 F. 2d 909, 911. . . . Where the injunctive power of the court is exercised for the enforcement of an administrative order, the order must be appropriate for present enforcement. See N.L.R.B. v. Eanet, 85 U.S. App. D.C. 371, 179 F. 2d 15, 21; N.L.R.B. v. Norfolk Shipbuilding and Dry Dock Co., 4 Cir, 172 F. 2d 813, 815-816.
>
> "While an administrative agency is not a court of equity, its orders must be based on evidence giv-

> ing them reasonable support, and such support is not given for an order relating to present and future practices by evidence relating only to transactions which occurred a decade before it was entered." *New Standard Pub. Co* v. *FTC*, 194 F. 2d 181, 182-183 (4th Cir. 1952).

See also *NLRB* v. *Eanet*, 179 F. 2d 15, 21 (D.C. Cir. 1949) ("entries of decrees unrelated to present reality is not countenanced by our jurisprudence").

In sustaining the Commission's order the court below again is in conflict with the decisions of this Court as well as the courts of appeal of other circuits.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

May 24, 1968

Respectfully submitted,

ARTHUR LITTLETON
ROBERT C. MCADOO
MORGAN, LEWIS & BOCKIUS
2107 The Fidelity Building
Philadelphia, Pennsylvania 19109
Attorneys for Petitioner Baldwin-Lima-Hamilton Corporation

HOWARD M. HOLTZMANN
MARK J. MAGED
HOLTZMANN, WISE & SHEPARD
30 Broad Street
New York, New York 10004
Attorneys for Petitioner CF&I Steel Corporation, name changed from The Colorado Fuel & Iron Corporation, an original party and successor by merger to John A. Roebling's Sons Corporation

ALBERT R. CONNELLY
EDWARD C. PERKINS
JAY E. GERBER
DAVID BOIES
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for Petitioner Bethlehem Steel Corporation, as an original party and as successor by merger to Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation

LESTER S. CLEMONS
QUARLES, HERRIOTT, CLEMONS, TESCHNER & NOELKE
411 E. Mason Street
Milwaukee, Wisconsin 53202
Attorneys for Petitioner Bucyrus-Erie Company

GILBERT W. OSWALD
SAMUEL D. SLADE
SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
Attorneys for Petitioner Lukens Steel Company

JOSEPH A. VIESON
W. ROBERT CHANDLER
CROSS, WROCK, MILLER & VIESON
4200 Penobscot Bldg.
Detroit 25, Michigan
Attorneys for Petitioner Detroit Steel Corporation

C. M. THORP, JR.
JAMES A. BELL
CHARLES WEISS
THORP, REED & ARMSTRONG
Grant Building
Pittsburgh, Pennsylvania 15219
Attorneys for Petitioner Edgewater Steel Company

WILLIAM R. BASCOM
EDWIN S. TAYLOR
BRYAN, CAVE, MCPHEETERS AND MCROBERTS
Boatmen's Bank Building
St. Louis 2, Missouri
Attorneys for Petitioner Granite City Steel Company

RALPH M. BARLEY
BARLEY, SNYDER, COOPER & MUELLER
45 North Duke Street
Lancaster, Pennsylvania 17602
Attorneys for Petitioner Grinnell Corporation, successor by merger to Columbia Malleable Castings Corporation

WILLIAM B. CUDLIP
WILLIAM G. WARREN
DICKINSON, WRIGHT, MCKEAN & CUDLIP
800 First National Bldg.
Detroit 26, Michigan
Attorneys for Petitioner McLouth Steel Corporation

JAMES A. BELL
CHARLES WEISS
ELI KRIVOSHIA, JR.
THORP, REED & ARMSTRONG
Grant Building
Pittsburgh, Pennsylvania 15219
Attorneys for Petitioners National Steel Corporation and Weirton Steel Company

ARNOLD F. SHAW
DONOHUE, KAUFMANN AND SHAW
503 D Street, N. W.
Washington 1, D. C.
Attorneys for Petitioner Phoenix Steel Corporation, successor by merger to Phoenix Iron and Steel Company and Central Iron and Steel Company

L. L. LEWIS
W. H. BUCHANAN
525 William Penn Place
Pittsburgh 30, Pennsylvania
Attorneys for Petitioner United States Steel Corporation, with respect to its plant at Geneva, Utah

SUPREME COURT, U. S.

MAY 24 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. [redacted] 125

LURIA BROTHERS AND COMPANY, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION

No. 126

BALDWIN-LIMA-HAMILTON CORPORATION, ET AL.,
Petitioners

v.

FEDERAL TRADE COMMISSION

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MORRIS WOLF
NATHAN SILBERSTEIN
BURTON CAINE
WOLF, BLOCK, SCHORR AND SOLIS-COHEN
12th Floor, Packard Bldg.
Phila., Pa. 19102
Attorneys for Petitioner Luria Brothers and Company, Inc.

ALBERT R. CONNELLY
EDWARD C. PERKINS
JAY E. GERBER
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York
Attorneys for Petitioner Bethlehem Steel Corporation as an original party and as successor by merger to Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation

ROBERT C. MCADOO
MORGAN, LEWIS & BOCKIUS
2107 The Fidelity Building
Philadelphia, Pennsylvania 19109
Attorneys for Petitioner Baldwin-Lima-Hamilton Corporation

LESTER S. CLEMONS
QUARLES, HERRIOTT, CLEMONS, TESCHNER & NOELKE
411 E. Mason Street
Milwaukee, Wisconsin 53202
Attorneys for Petitioner Bucyrus-Erie Company

HOWARD M. HOLTZMANN
MARK J. MAGED
HOLTZMANN, WISE & SHEPARD
30 Broad Street
New York 4, New York
Attorneys for Petitioner The Colorado Fuel & Iron Corporation as an original party and as successor by merger to John A. Roebling's Sons Corporation

JOSEPH A. VIESON
W. ROBERT CHANDLER
CROSS, WROCK, MILLER & VIESON
4200 Penobscot Bldg.
Detroit 25, Michigan
Attorneys for Petitioner Detroit Steel Corporation

C. M. THORP, JR.
JAMES A. BELL
CHARLES WEISS
THORP, REED & ARMSTRONG
Grant Building
Pittsburgh, Pennsylvania
Attorneys for Petitioner Edgewater Steel Company

WILLIAM R. BASCOM
EDWIN S. TAYLOR
BRYAN, CAVE, MCPHEETERS AND MCROBERTS
Boatmen's Bank Building
St. Louis 2, Missouri
Attorneys for Petitioner Granite City Steel Company

RALPH M. BARLEY
BARLEY, SNYDER, COOPER & MUELLER
45 North Duke Street
Lancaster, Penna. 17602
Attorneys for Petitioner Grinnell Corporation, successor by merger to Columbia Malleable Castings Corporation

GILBERT W. OSWALD
SAMUEL D. SLADE
SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
Attorneys for Petitioner Lukens Steel Company

WILLIAM B. CUDLIP
WILLIAM G. WARREN
DICKINSON, WRIGHT, MCKEAN & CUDLIP
800 First National Bldg.
Detroit 26, Michigan
Attorneys for Petitioner McLouth Steel Corporation

JAMES A. BELL
CHARLES WEISS
ELI KRIVOSHIA, JR.
THORP, REED & ARMSTRONG
Grant Building
Pittsburgh, Pennsylvania
Attorneys for Petitioners National Steel Corporation and Weirton Steel Company

ARNOLD F. SHAW
DONOHUE, KAUFMANN AND SHAW
503 D Street, N. W.
Washington 1, D. C.
Attorneys for Petitioner Phoenix Steel Corporation, successor by merger to Phoenix Iron and Steel Company and Central Iron and Steel Company

L. L. LEWIS
W. H. BUCHANAN
525 William Penn Place
Pittsburgh 30, Pennsylvania
Attorneys for Petitioner United States Steel Corporation

INDEX TO APPENDIX

Opinion of the Court of Appeals 1a

FTC Order Providing for the Filing of Exceptions to Proposed Final Order 34a

Opinion of the Commission 40a

Opinion of Dissenting Commissioner 107a

FTC Final Order 116a

Opinion of Commission on Respondents' Exceptions to Proposed Final Order 122a

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14402, 14411 to 14421, 14470 to 14472

LURIA BROTHERS AND COMPANY, INC., ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

Argued January 21, 1966
Before McLAUGHLIN, KALODNER and GANEY,
Circuit Judges

OPINION OF THE COURT
(Filed January 8, 1968)

By McLAUGHLIN, *Circuit Judge*

Our decision in this appeal has been delayed because of litigation pending in the United States Supreme Court concerning the power of the Federal Trade Commission (Commission) to pass upon the merits of controversies before it during the period when the Commission was composed of only three of its five members and one of those three dissented. The Supreme Court has validated the hearing and decisional status of the Commission as constituted when it heard and decided that case. Federal Trade Commission v. Flotill Products, Inc., U. S. (December 4, 1967). We have therefore considered and determined the matter before us on its merits.

The Federal Trade Commission issued its original complaint in this proceeding on January 19, 1954. This was

amended and supplemented by a subsequent complaint issued on July 13, 1954. Hearings were commenced on January 12, 1955, and continued periodically until May 14, 1958. During the course of the hearings which took 113 days, the testimony of more than 250 witnesses was taken.[1] Counsel for the Commission filed proposed findings of fact and conclusions of law on November 10, 1958. The various respondents (petitioners herein)[2] filed their separate counter-

---

[1]The record of the case is comprised of approximately 14,000 pages of testimony, 130 pages of depositions and 1,300 documentary exhibits totalling about 10,000 pages.

[2]Several companies that were respondents before the Commission are not petitioners herein since the Commission's order does not affect them. The respondents that are petitioners herein are (1) Bethlehem Steel Corporation which is the parent of Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation. Bethlehem operated five eastern mills and was the largest producer of iron and steel products and the largest scrap consumer in the eastern part of the United States. Bethlehem-Pacific operated three western plants and was the largest scrap purchaser on the Pacific Coast. (2) United States Steel is involved because of its purchases of scrap for its plant located in Geneva, Utah, which is the largest scrap consumer on the western slope of the Rocky Mountains. (3) Weirton Steel Company, a subsidiary of National Steel Corporation, is the third largest consumer of scrap purchased from broker-dealer sources in the Pittsburgh-Youngstown area. (4) Colorado Fuel and Iron Corporation (CF&I) an original party and successor by merger to John A. Roebling's Sons Corporation, at the time of the proceeding owned five plants and was the ninth largest steel producer in the United States. Its plant at Pueblo, Colorado was the largest scrap consumer in the Rocky Mountain area. Its other plants constituted the second largest scrap consuming unit in the North Atlantic area. (5) Phoenix Steel Corporation had two plants in Pennsylvania, and they are the 20th largest integrated steel-producing works in the United States, and in some years were the second largest scrap consuming unit, among the reporting mills, in the North Atlantic area, (6) Granite City Steel Company is the 16th largest integrated steel producer in the United States and is the largest scrap purchaser in the St. Louis area. (7) Lukens Steel Company is the fourth largest scrap purchaser in the North Atlantic area. (8) Detroit Steel Corporation is the 17th largest integrated steel producer and appeared as a respondent below as a result of its purchases for its plant at Portsmouth, Ohio. (9) McLouth Steel Corporation is the 19th

findings of fact, conclusions of law and orders from January 5, 1959 to January 13, 1959. The hearing examiner's initial decision was filed on March 29, 1961. Oral argument before the Commission was heard on November 21, 1961, and the Commission's opinion, which basically adopted the hearing examiner's initial decision, was announced on November 15, 1962. On April 11, 1963, Luria Brothers and Company, Inc. petitioned this Court, pursuant to Section 5(c) of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(c). (1958), and to Section 11 of the Clayton Act, 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21(c), to review and set aside the order of the Commission dated February 13, 1963.

I. The Complaint

The complaint, as finally amended and supplemented, was in two counts. Count I in substance charged that Luria and the other petitioning mills entered into a series of agreements whereby Luria was to act as the exclusive or substantially exclusive broker for the petitioning mills. It charged that these agreements led to a restraint of trade and tended to create a monopoly in the scrap metal market in

---

largest integrated steel producer in the United States and was made a respondent below as a result of its operations at its facilities at Trenton, Michigan. (10) Baldwin-Lima-Hamilton Corporation (BLH) appeared below because of its operations and scrap purchases at its plant at Burnham, Pennsylvania. (11) Edgewater Steel Company is the 27th largest semi-integrated steel producer in the United States. (12) Bucyrus-Erie Company is a petitioner herein by reason of its scrap buying policy for its plants at Erie, Pennsylvania. (13) Grinnell Corporation, successor by merger to Columbia Malleable Castings Corporation, is a petitioner as a result of its scrap purchases for its iron foundry at Columbia Pennsylvania. (14) Southwest Steel Corporation was a scrap broker which competed with Luria in the Pittsburgh-Youngstown area. On February 1, 1950, Luria purchased all of the issued and outstanding stock of the company thereby eliminating Southwest as a competing factor.

violation of Section 5 of the Federal Trade Commission Act, 15 U. S. C. § 45(a)(1).[3] Count I also charged that the petitioning mills conspired to effect a monopoly in Luria, that Luria and others restrained trade in export scrap, that petitioners engaged in coercive tactics, and that Luria acquired various competing companies—all in violation of Section 5.

Count II specifically charged Luria with violation of Section 7 of the Clayton Act, 15 U. S. C. § 18[4] by the acquisition of the stock of Southwest Steel Company, a competing broker, and the stock of six other companies.

Several charges were dismissed by the hearing examiner and the Commission. Those sustained were a finding that petitioners violated Section 5 of the Federal Trade Commission Act by separate agreements whereby each mill made Luria its exclusive or substantially exclusive broker; that Luria's participation in the sale of scrap to the purchasing agent, Office Commun des Consommateurs de Ferraille (OCCF), for the Coal and Iron Community of Western Europe was illegal; and that Luria's ownership of the stock of Southwest violated Section 7 of the Clayton Act.

The Commission's order prohibited Luria from contracting or agreeing to act as the exclusive or substantially ex-

---

[3] "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." Section 5(a)(1), 38 Stat. 717, as amended by 52 Stat. 111 (1938), and as further amended by 66 Stat. 632 (1952), 15 U. S. C. § 45(a)(1) (1964).

[4] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Section 7, 38 Stat. 731 (1914), as amended by 64 Stat. 1125 (1950), 15 U. S. C. § 18 (1964).

clusive broker for any plant of any respondent mill or any other buyer of scrap iron and steel; forbad the respondent mills without limit as to time to buy all or substantially all their scrap from or through Luria, and forbad them for five years to buy more than 50 percent of their scrap from Luria except to the extent that scrap, adequate in quantity and quality, is not available from other suppliers on terms which are substantially similar and competitive; forbad Luria, directly or indirectly, to agree to act as the exclusive or substantially exclusive broker in the export of scrap; forbad Luria for five years from acquiring the business of any scrap broker or dealer without the permission of the Commission and ordered Luria to divest itself of its interest in Southwest.

It is from these findings and the foregoing order that petitioners seek review by this Court.

II. Industrial Facts

At least 98 percent of the iron and steel scrap consumed in the United States is purchased by the producers of iron and steel. Scrap and pig iron are the principal metallics used in making iron and steel. Part of the scrap used in the production process is generated as a waste product of the mills' own activities and is referred to as "home scrap." This constitutes about one-half of the scrap consumed by producers. The remainder must be purchased from outside sources and is referred to as "purchased scrap." Sources of purchased scrap include railroads, industrial materials, ships, automobiles, discarded household appliances, etc.

Much scrap is collected by a vast army of junk dealers and peddlers who make regular rounds for this purpose.

These junkmen usually sell their scrap to larger dealers who in turn sell directly to the consumer or to brokers. Approximately 90 percent of all scrap used is purchased either from dealers or brokers. Scrap brokers, as that term is used in the industry, has reference to persons who purchase and sell scrap for their own account, taking title to it and assuming all the risks incident to ownership. In effect they are wholesale dealers, but do not take physical possession of the material. Scrap dealers, on the other hand, operate yards where they take possession of the scrap, sort and process it. There is no hard and fast line differentiating brokers from dealers since in many instances, a dealer may act as a broker and some brokers also own yards where they operate as dealers.

Brokers derive their profit from the difference between what they pay for the scrap and what they can get for it. In general, they aim at a differential of $1.00 a gross ton, but because of market fluctuations and varying competitive conditions, the brokerage business is highly speculative.

III. History of Luria

The Luria business began about 1889 when the grandfather and greatgrandfather of the present generation of Lurias began to collect scrap. A small office was opened in Reading, Pennsylvania, and the business was incorporated in 1918. By 1930, Luria had opened offices in New York, Pittsburgh, Boston and Philadelphia and set up two yards in Pennsylvania. By 1946, Luria had become a substantial supplier to eleven of the petitioning mills. At the same time Luria expanded westward opening offices in Detroit, Chicago, Cleveland, Houston and St. Louis. Later Luria opened offices in Colorado, Alabama, Utah, California and Oregon. Domestically Luria is the largest scrap broker with

16 offices and 6 yards located in representative cities throughout the country. When the Korean War ended in 1953, Luria entered the export market by supplying Hugo Neu, a broker specializing in the export of scrap. In 1954, Luria and two other brokers joined forces and entered into export agreements with OCCF.

IV. The Relevant Domestic Markets

The statistical information gathered by the Commission covers the scrap purchases of practically all the steel mills in the United States since approximately 99 percent of the country's steel mills reported their purchases to the Commission. These mills referred to as "reporting mills" account for between two-thirds and three-fourths of all the scrap consumed in the United States. As previously indicated, 90 percent of the scrap purchased by the reporting mills is obtained from broker-dealer sources. In tabulating its data the Commission properly excluded purchases from sources other than broker-dealers since the sales by industrial fabricators, railroads and shipyards do not effectively compete in the market in which Luria and other broker-dealers operate.

In evaluating the effect of Luria's operations on the scrap market the Commission divided the country into five geographic areas, one subdivision and the nation as a whole. (1) The North Atlantic area consists of the six New England states, New York, New Jersey, Eastern Pennsylvania, Delaware, Maryland and the District of Columbia. This area contains 24 reporting mills which operate 38 plants. During the pertinent period of the investigation, the years 1947-1954, the petitioning mills accounted for 80 percent of all scrap purchased by the reporting mills from broker-dealer sources. The purchases by the reporting mills in

this district accounted for approximately 20 percent of all purchases by domestic mills from broker-dealer sources. (2) The Eastern Pennsylvania district is a subdivision of the North Atlantic area in which are located 13 of the above 24 mills. The petitioning mills accounted for 84 percent of the purchases made by these 13 reporting mills. Together these 13 mills account for approximately one-half of all purchases made by all the reporting mills in the North Atlantic area. (3) The Pittsburgh-Youngstown area is a hexagonal territory extending from Johnstown on the east, through Monessen and Washington, Pennsylvania, northwest through Steubenville, Ohio, Weirton, West Virginia, Youngstown and Warren, Ohio, east through Sharon, Pennsylvania, and back to Johnstown via Butler, Pennsylvania. Twenty-three mills operating 29 plants are located within this area. In 1954, the petitioning mills accounted for 18 percent of the total purchases in that area by all reporting mills. (4) The St. Louis area includes metropolitan St. Louis and its surburban areas in Missouri and Illinois. Granite City, the only petitioner in this area, and Laclede Steel Company, a reporting mill, operate the only two mills in the area. The purchases of the two mills and three large foundries in the area represent 80 percent of all purchases in the region. Granite City alone accounts for one-half of the scrap purchased by these five companies. (5) The Rocky Mountain area includes the states of Arizona, Utah, Colorado, Wyoming, Idaho and Montana. Petitioners, CF&I at Pueblo, Colorado, and U. S. Steel at Geneva, Utah, operate the only two mills in the area. (6) The Pacific Coast area contains 9 reporting mills with a total of 12 plants in this area which is comprised of the states of California, Oregon and Washington. The purchases of Bethlehem-Pacific, the sole petitioning mill in the

area, total almost one-half of all the purchases of the 9 reporting mills. (7) In the United States as a whole, the petitioning mills accounted for 30 percent in 1953, and 24 percent in 1954 of total scrap purchases by all reporting mills from broker-dealer sources.

The following table clearly depicts the extent to which the practices of the petitioning mills affect the scrap markets in the various areas.

Percentage Shares of the Petitioning Mills' Purchases from Broker-Dealer Sources in Total Purchases from Such Sources By All Reporting Mills in the Respective Areas

	1947	1948	1949	1950	1951	1952	1953	1954
North Atlantic	80	79	75	74	77	78	79	80
Eastern Pennsylvania	82	81	81	79	80	79	79	84
Pittsburgh-Youngstown	—	—	—	13	15	16	16	18
St. Louis	—	—	—	45	44	39	50	44
Rocky Mountain	100	100	100	100	100	100	100	100
Pacific Coast	40	37	38	41	43	45	52	49
United States	27	25	27	24	28	38	30	24

Luria's percentage share in the total scrap purchases by all reporting mills from broker-dealer sources in each relevant area between 1947 and 1954 is indicated by the following tabulation.

	1947	1948	1949	1950	1951	1952	1953	1954
North Atlantic	34.1	38.1	46.8	54.6	62.0	68.8	73.1	74.5
Eastern Pennsylvania	48.5	51.8	58.3	72.4	72.2	74.1	78.9	83.3
Pittsburgh-Youngstown	20.4	20.6	26.2	37.2	32.2	35.4	36.5	36.0
St. Louis	—	—	16.5	31.0	51.7	42.5	51.6	45.4
Rocky Mountain	99.3	94.0	98.6	95.2	87.2	90.6	95.5	98.9
Pacific Coast	—	—	6.6	11.7	21.2	33.3	45.8	50.6
United States	17.1	18.8	22.3	29.4	31.4	33.3	36.5	33.7

Even when the Commission confined its evaluation of Luria's domination in the scrap industry to a comparison of the purchases made by the petitioning mills from Luria

with those made by all reporting mills from all brokers and dealers, Luria's overshadowing position was brought into focus as indicated by the following table.

Percentage Shares of the Petitioning Mills' Purchases from Luria and Subsidiaries in Total Purchases from Broker-Dealers By All Reporting Mills

	1947	1948	1949	1950	1951	1952	1953	1954
North Atlantic	29	33	40	47	56	62	68	70
Eastern Pennsylvania	41	43	50	61	61	63	73	75
Pittsburgh-Youngstown	10	7	15	9	11	12	12	12
St. Louis	—	—	0.1	29	44	39	50	44
Rocky Mountain	100	94	99	96	87	91	96	99
Pacific Coast	—	—	2	8	16	25	39	39
United States	10	10	14	16	21	22	25	21

Luria's position of dominance in its relations with the petitioning mills in 1953 and 1954 is indicated by the percentage of scrap requirements filled by Luria for each mill.

Percent of Total Bought from Luria

	1953	1954
Lukens	89.8	87.7
B.L.H.	96.7	94.1
Columbia	100.0	100.0
C. F. & I.	98.4	95.3
Edgewater	100.0	100.0
Phoenix	100.0	99.4
Granite City	100.0	100.0
Detroit	91.1	100.0
National	70.2	69.8
U. S. S.	89.5	93.9
McLouth	71.9	74.2
Bethlehem	81.2	80.9
Bethlehem-Pacific	75.4	80.4
Bucyrus-Erie	89.1	84.2

V. The Foreign Market

In 1954, Luria directed its efforts toward securing a hold in the export market. In 1953, the European Common Market countries had formed a central buying office to purchase scrap required by foreign steel mills. This office, OCCF, contracted Luria, Schiavone-Bonomo, and Western Steel International Corporation for the purpose of obtaining a scrap broker in the United States. The three concerns negotiated a contract with OCCF on July 14, 1954 providing that the three would provide all scrap to be purchased by OCCF until December 31, 1954. By subsequent arrangement, the contract was extended until December 31, 1955. Between 1954 and 1956, the six Common Market countries purchased between 66 and 84 percent of the total scrap exported from the United States to Europe. In 1954, the Luria group supplied 90 percent and in 1955, 95 percent of total scrap purchased by OCCF from the United States.

The agreement with OCCF had a substantial effect on Luria's domestic competitors since in 1954, Luria foreclosed 80 percent of the domestic scrap market in the North Atlantic area. With only 20 percent of the domestic market available, Luria's competitors were forced to dispose of their scrap abroad. Since the six Common Market countries purchased betwen 66 and 84 percent of the total scrap exported to Europe in the period between 1954 and 1956, Luria's competitors were effectively barred from both the domestic and foreign scrap markets.

VI. The Southwest Acquisition

Southwest was a scrap broker with its scrap sales concentrated in the Pittsburgh-Youngstown area. Prior to its acquisition by Luria's purchase of all its issued and

outstanding stock on February 1, 1951, Southwest was the second largest scrap broker in the area preceded only by Luria. Of the nine other principal brokers in the area, Southwest's sales exceeded its closest competitor by two to one. Before the acquisition, Luria and Southwest combined supplied almost one-half of the total scrap purchased by the reporting mills from brokers and dealers in the area. Moreover, both companies supplied the same consumers. The record justifies the Commission's finding that Luria and Southwest were substantial competitors in the Pittsburgh-Youngstown area.

VII. Luria's Exclusive or Substantially Exclusive Operations With the Various Petitioners

The Commission's finding that Luria's practices violated Section 5 of the Federal Trade Commission Act is based on evidence that during the years 1947 through 1954, the percentage of business conducted with Luria greatly increased and Luria employed tactics in conjuction with the various petitioners designed to eliminate competing brokers. A review of the record manifestly supports the Commission's conclusions.

Bethehem is the largest scrap purchaser in the Eastern part of the United States where it operates four scrap consuming plants. Prior to 1950, Bethlehem's scrap purchases from Luria for its four plants in the North Atlantic area were relatively small. After 1950, this situation strikingly changed. Between 1947 and 1949, Luria's share rose from 15 to 32 percent while between 1950 and 1954, it increased from 40 to 83 percent. Since Bethlehem's purchases from broker-dealer sources represented close to 50 percent of the total broker-dealer purchases in the North Atlantic area, in 1954 Luria's competitors were foreclosed from 40 percent of the market.

Concomitant with Luria's percentage increase, Bethlehem began to discriminate against Luria's competitors, many of whom had been former suppliers of Bethlehem. One of these competitors was Schiavone-Bonomo Corporation, which in 1947 was Bethlehem's second largest supplier. During the succeeding years Schiavone-Bonomo's sales significantly decreased until in 1954, it was no longer among Bethlehem's five largest suppliers. Bethlehem also placed restrictions on Schiavone-Bonomo by requiring it to secure scrap only from certain designated areas and by paying it less than it gave to Luria. These same practices were employed against other former suppliers to Bethlehem such as Commerical Steel and Chemical Corporation, Harcon Corporation and Louis Cohen & Sons. These and other broker-dealer concerns found that their sales to Bethlehem decreased as Luria's increased, and they were informed by Bethlehem that it would only purchase the scrap these companies were selling if they sold through Luria. Not only did Bethlehem cease making purchases from former broker-dealers, but it channelled shipments from direct suppliers such as industrial fabricators and railroads through Luria. The record clearly supports the hearing examiner's conclusion that "As a result of these changes, somewhere between 1950 and 1953 Luria became Bethlehem's substantially exclusive broker."

The relationship between Luria and Bethlehem is symptomatic of the condition that existed throughout the North Atlantic area. The same policy of increasing sales and decreasing competition existed in Luria's relations with C. F. & I.'s four plants in the area, with Phoenix, Lukens, B-L-H and Grinnell. It is clear that Luria had established itself as the exclusive or substantially exclusive broker for the six petitioning mills in the area whose combined purchases of scrap accounted for approximately 80 percent of the total scrap purchased by all the reporting mills.

The Rocky Mountain area contains two reporting mills, one owned by C. F. & I. located at Pueblo, Colorado, and the other owned by U. S. Steel located at Geneva, Utah. C. F. & I.'s mill is the largest scrap consuming plant in the area. C. F. & I. admits that it entered into an understanding with Luria on June 1, 1946 to the effect that the latter would serve as its exclusive broker. On the same day a formal notice to that effect was issued to the trade. The understanding was formalized by a written contract executed on August 23, 1946, to run for a term of five years. Although the formal agreement was terminated on October 9, 1946, the oral agreement continued in full force. This is indicated by the fact that except for 1951 when due to Government allocations Luria supplied 95 percent, in the years 1947 through 1954, Luria supplied 100 percent of the scrap purchased by C. F. & I. for its Pueblo plant.

In October, 1948, the Geneva plant of U. S. Steel accepted Luria's offer to act as its exclusive broker. Notice of this was sent to the trade, and although U. S. Steel contends that the agreement terminated in 1952, this contention is not supported by the statistical evidence nor by any announcement of the alleged termination by U. S. Steel. Following the agreement, Luria supplied 95 percent of the scrap purchased from broker-dealer sources by Geneva in 1949, 90 percent in 1953 and 94 percent in 1954. Certainly if the agreement was terminated as U. S. Steel argues, its termination did not alter petitioner's relations with Luria.

Bethlehem-Pacific, the only petitioner in the Pacific Coast area, operates three plants which account for approximately 50 percent of the scrap purchased by the reporting mills. Bethlehem-Pacific's practices in the area closely followed those of Bethlehem's in the North Atlantic area. For example, until 1950, its Los Angeles plant pur-

chased scrap from numerous brokers. In October of that year, Bethlehem-Pacific entered a ten year written contract whereby it agreed to purchase the major portion of its monthly supplies from Luria. The effect of the agreement is evidenced by the fact that in 1949 Luria supplied the Los Angeles plant with only one percent of its scrap requirements where as in 1951, it increased to 57 percent and in 1953, it reached 94 percent. Furthermore, in some instances the brokers who had previously supplied the Los Angeles plant were told they would have to sell through Luria.

Luria first supplied the Seattle plant in 1949. By 1952, its sales accounted for 46 percent and by 1954, for 83 percent of the scrap purchased by the plant from broker-dealer sources. Here too, former suppliers were told they would have to sell their scrap through Luria.

Luria's supply agreements reached such proportions that in 1954, it supplied 80 percent of Bethlehem-Pacific's scrap requirements resulting in the foreclosure of 40 percent of the Pacific Coast market from competition.

Luria's exclusive supply agreement for the St. Louis area is indicated by its relationship with Granite City. Prior to 1950, Luria supplied Granite City with only one percent of its scrap, the remaining 99 percent being filled by other brokers and dealers in the area. In March, 1950, Granite City and Luria agreed that the latter would supply the mill. A notice was sent to the trade announcing the "appointment of Luria Brothers & Company, Inc. of Philadelphia, Pennsylvania, as our exclusive scrap broker." Former suppliers were told to sell through Luria. In 1953, this arrangement accounted for 50 percent of total scrap purchases by the reporting mills in the area.

The same program was carried out in the Pittsburgh-Youngstown area. Luria exhibited the same substantial growth while competitors experienced decreases and were told they must sell through Luria. In this manner Luria has become the exclusive or substantially exclusive broker for Bethlehem's Johnstown plant, Edgewater, and Weirton, a subsidiary of National Steel. These three plants account for 18 percent of total purchases by all reporting mills in the area and by 1954, Luria accounted for 36 percent of scrap sales by all brokers and dealers in the area.

The Commission's examination of the scrap purchasing policies of Bucyrus, McLouth, and Detroit Steel, which did not fit into any of the other previously delineated areas, also revealed Luria's exclusive or substantially exclusive scrap supplying arrangements.

On the basis of the foregoing the Commission decided that Luria's agreements were in violation of Section 5 of the Federal Trade Commission Act. The petitioning mills challenge these findings claiming (1) the statistical data should not be limited to broker-dealer sources but should include all suppliers of scrap metal; (2) the market areas used by the hearing examiner did not comply with the standards announced by the applicable case law; (3) the agreements were terminable at will and, therefore, do not violate the anti-trust laws; (4) the decision to buy mainly from Luria was a proper business decision independently reached by the petitioning mills; (5) the mills were forced to purchase from Luria because other brokers could not meet their increasing demands; and (6) the order of the Commission is arbitrary, unreasonable and ambiguous. They also claim error in the Commission's finding of a violation of Section 7 of the Clayton Act. We turn now to a consideration of these points.

THE FEDERAL TRADE COMMISSION ACT

Petitioners urge error in the Commission's compilation of data. They argue it should not have been restricted to purchases only from broker-dealer sources but should have included the sales of all scrap suppliers to all scrap purchasers. Several reasons justify the exclusion. First, if the Commission had attempted to obtain this information, its task would have reached enormous if not prohibiting proportions. Second, the information obtained contains the scrap purchases of practically every steel mill in the United States. These purchases account for between two-thirds and three-fourths of all the scrap used in the country and of this amount, 90 percent is purchased from broker-dealer sources. Third, the purpose of the proceeding was to open the market to Luria's competitors who consist of other broker-dealers whose economic livelihood is directly affected by the size of the market freed from monopolistic control. The Commission was not required to include suppliers other than broker-dealers especially since their inclusion would not have substantially altered the result. Cf. United States v. Philadelphia Nat. Bank, 374 U.S. 321, 364,n. 40 (1962).

Petitioners also contend the Commission erred in its determination of the relevant market areas within which to measure the effects of Luria's influence. The geographical divisions selected by the Commission were based on the natural gravitational effect of economic factors. The evidence indicates and the Commission was warranted in finding that transportation costs produced various clusters of scrap buyers and sellers. Cf. United States v. Philadelphia Nat. Bank, supra, 374 U.S. at page 358; American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F.Supp. 387,.398 (D.C.S.D. N.Y. 1957), aff'd 259 F.2d 524

(2 Cir. 1958). As a rule sales were contained within an area having a radius of approximately 100 miles from the broker-dealer. Shipment beyond this distance became prohibitively expensive. Of course, at times sales were made to plants located more than 100 miles from the broker-dealer, but these long distance sales were an exception and occurred only when needs were such that the closer sellers were unable to meet demands.

Petitioners urge that the theory of the Government's case was based on Section 3 of the Clayton Act, 15 U. S. C. § 14,[5] because of the emphasis placed on proof of agreements or arrangements between the various mills. They argue, therefore, that their actions and practices must be judged in reference to the standards governing cases arising under the Clayton Act. The error in petitioners' argument is that it is clear that *the proceeding was brought under Section 5* of the Federal Trade Commission Act, 15 U. S. C. § 45, *to enjoin an incipient monopoly* which if undeterred would violate Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2.[6] Section 5 of the Federal Trade

---

[5] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to * * * make a sale or contract for sale of goods * * * on the condition, agreement or understanding that the * * * purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller, where the effect of such * * * sale, or contract for sale * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Section 3, 38 Stat. 731 (1914), 15 U. S. C. § 14 (1964).

[6] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *" Section 1, 26 Stat. 209 (1890), as amended by 50 Stat. 693 (1955), 15 U. S. C. § 1 (1964).

"Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *" Section 2, 26 Stat. 209 (1890), 15 U. S. C. § 2 (1964).

Commission Act proscribes a broad area. The unfair methods of competition violative of that section are not limited to practices violative of the Sherman Act, the Clayton Act or the common law. The Federal Trade Commission Act was designed as a supplement to and has been interpreted as a complement to the Sherman and Clayton Acts. Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U. S. 392 (1953), rehearing denied, 345 U. S. 914 (1953); Federal Trade Commission v. Cement Institute, 333 U. S. 683 (1948), rehearing denied, 334 U. S. 829 (1948); Federal Trade Commission v. R. F. Keppel & Bro., 291 U. S. 304 (1934); Federal Trade Commission v. Raladam Co., 283 U. S. 643 (1931). Speaking of the Commission and its function under the Federal Trade Commission Act, the Supreme Court stated:

> "Far from being regarded as a rival of the Justice Department and the district courts in dissolving combinations in restraint of trade, the new Commission was envisioned as an aid to them and was specifically authorized to assist them in the drafting of appropriate decrees in antitrust litigation. All of the committee reports and the statements of those in charge of the Trade Commission Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages." Federal Trade Commission v. Cement Institute, supra, 333 U.S. at page 692.

The same argument raised by petitioners here was considered and rejected by the Supreme Court in its recent

decision in Federal Trade Commission v. Brown Shoe Co., 384 U.S. 316, 320 (1965). The Court stated:

> "* * * the Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws. The record in this case shows beyond doubt that Brown, the country's second largest manufacturer of shoes, has a program, which *requires* shoe retailers, unless faithless to their *contractual obligations* with Brown, substantially to limit their trade with Brown's competitors. This program obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act against *contracts which take away freedom of purchasers to buy in an open market.* Brown nevertheless contends that the Commission has no power to declare the franchise program unfair without proof that its effect 'may be to substantially lessen competition or tend to create a monopoly' which of course would have to be proved if the Government were proceeding against Brown under § 3 of the Clayton Act rather than § 5 of the Federal Trade Commission Act. We reject the argument that proof of this § 3 element must be made for as we pointed out above, our cases hold that the Commission has power under § 5 to arrest *trade restraints* in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws."

If we were to accept petitioners' argument and require proof necessary to show Sherman or Clayton Act violations, we would vitiate the congressional purpose behind the enactment of the Federal Trade Commission Act since the Commission would be powerless to deal with unfair trade practices in their incipient stages. See Atlantic Rfg. Co. v. Federal Trade Commission, 381 U.S. 357, 369 (1964). Thus in performing its function the Commission need only use the antitrust statutes as guidelines, and in reviewing its determinations, this Court decides whether the Commission's findings of fact have support in the record and a reasonable basis in law. 15 U. S. C. § 45(c); Atlantic Rfg. Co. v. Federal Trade Commission, supra, 381 U. S. at page 367.

Since the Commission's purpose in the instant proceeding was to arrest in its incipiency acts and practices which would develop into Sherman Act violations, we look to cases decided under that Act for guidance. Section 1 of the Sherman Act makes illegal any unreasonable restraint on interstate commerce regardless of the amount of commerce involved while Section 2 outlaws the monopolization of "any part" of interstate commerce. "Any part" has been construed to mean any appreciable part. Times-Picayune v. United States, 345 U. S. 594, 611 (1952); United States v. Yellow Cab Co., 332 U. S. 218, 225 (1946). Guided by these and other decisions we are satisfied beyond question that the requisite amount of commerce was involved here.

The record supports the Commission's conclusions that Luria's practices during the years under investigation showed its intention to monopolize the scrap brokerage business. The various written agreements entered into between Luria and C.F.&I. and U. S. Steel indicate Luria's

intention. Although, it is true that these agreements were formally terminated within a short time, the Commission was justified in finding that in fact the relationship remained unchanged. Petitioners place much emphasis on their contention that since any arrangements that might exist were terminable by either part at will, no unlawful activity was shown. The evidence shows, however, that even if this were in fact true, nevertheless there had been no termination in the past and the prospects for any in the future were negligible. Also pointing to the exclusive or substantially exclusive supply arrangements was the evidence that Luria's competitors were being turned away from their former customers and directed to sell through Luria. Indeed on the basis of this and other evidence the Commission was warranted in concluding that Luria's practices in conjunction with its purchasers were in the nature of those proscribed by the Sherman Act and which the Commission was authorized to enjoin under the Federal Trade Commission Act. The methods employed by Luria to foreclose the market from its competitors clearly constituted unfair methods of competition within the ban of Section 5 of the Federal Trade Commission Act. Federal Trade Commission v. Motion Picture Advertising Service, supra, 344 U. S. at page 395.

Petitioners seek to justify their actions on the grounds that their dealings with Luria were based on sound business judgment. They claim they dealt with Luria only because it was the best in the business. If this argument were accepted under the circumstances of this case, it would open a large loophole in our antitrust laws. Furthermore, the evidence indicates that the decision to direct business toward Luria and away from other broker-dealers was activated by more than pure business motives. The Com-

mission acted entirely within its discretion in choosing not to accept this attempted justification. Federal Trade Commission v. Motion Picture Advertising Service Co., supra, 344 U. S. at page 395.

We have reviewed the evidence relating to the foreign market and Luria's agreement with OCCF. There is substantial support for the Commission's conclusion that Luria's practices here were also in violation of Section 5 of the Federal Trade Commission Act and must be enjoined in order to open the market to competition.

The Order

Several of petitioners' objections are directed at the Commission's order. Paragraph 1 of the order which prohibits Luria from acting as the exclusive or substantially exclusive broker for any of the plants of the petitioning mills is challenged on the grounds of vagueness and ambiguity. Paragraph 2(b) prohibits the petitioning mills, for a period of five years, from purchasing more than 50 percent of their annual scrap needs from Luria unless "scrap adequate in quantity and quality is not available from other suppliers on terms which are substantially similar and competitive." Petitioners attack the 50 percent limitation as arbitrary. They also claim surprise contending that they had no prior notice of the specific limitation and further challenge the order on the grounds that it is an improper affirmative command.

In reviewing the propriety of the various provisions of the order, we are mindful of the language of the Supreme Court in Federal Trade Commission v. National Lead Co., 352 U.S. 419, 428 (1956):

> "The Court has held that the Commission is clothed with wide discretion in determining the type

of order that is necessary to bring an end to the unfair practices found to exist. In Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608 (1946), the Court named the Commission 'the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' Id., at 612-613. Thereafter, in Federal Trade Commission v. Cement Institute, 333 U.S. 683, 726 (1948), the Court pointed out that the Congress, in passing the Act, 'felt that courts needed the assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation.' In the light of this, the Court reasoned, it should not 'lightly modify' the orders of the Commission. Again, in Federal Trade Commission v. Ruberoid Co., supra, at 473, we said that 'if the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.' We pointed out there that Congress had placed the primary responsibility for fashioning orders upon the Commission. These cases narrow the issue to the question: Does the remedy selected have a 'reasonable relation to the unlawful practices found to exist'?"

Petitioners' contention that the language "exclusive or substantially exclusive" is too vague cannot be accepted.

The order, when interpreted in light of the record, is clear and not subject to attack on that ground. It is necessarily general. Anything more specific would be subject to evasion. E. B. Muller & Co. v. Federal Trade Commission, 142 F.2d 511, 520, (6 Cir. 1944). Furthermore, the Commission's order is not required to "chart a course for the petitioner." Zenith Radio Corp. v. Federal Trade Commission, 143 F.2d 29, 31 (7 Cir. 1944).

Petitioners raise several hypothetical situations in their attack on the Commission's order. However, this avenue has been closed by the Supreme Court.

> "Respondents pose hypothetical situations which they say may rise up to plague them. However, 'we think it would not be good judicial administration,' as our late Brother Jackson said in International Salt Co. v. United States, 332 U.S. 392, 401 (1947), to strike the contested paragraph of the order to meet such conjectures. The Commission has reserved jurisdiction to meet just such contingencies. As actual situations arise they can be presented to the Commission in evidentiary form rather than as fantasies. And, we might add, if there is a burden that cannot be made lighter after application to the Commission, then respondents must remember that those caught violating the Act must expect some fencing in. United States v. Crescent Amusement Co., supra, at 187" Federal Trade Commission v. National Lead co., supra, 352 U.S. at page 431.

In the instant litigation the Commission has assured the petitioners of its willingness to grant relief if the circumstances should arise. Even without that assurance peti-

tioners could obtain all the necessary relief under the Commission's Rules of Practice, 16 C.F.R. § 3.26(b) (Supp. 1966).

Petitioners' claim of surprise is based on their assertion that the first indication of the 50 percent provision in paragraph 2(b) came when they read the examiner's order. But petitioners were given ample opportunity to object to this provision when they appealed to the Commission. The Commission heard these objections and gave petitioners a second opportunity to protest by entering a proposed order with its opinion. The final order was issued only after the Commission had heard further exceptions to the proposed order. The fact that petitioners did not have an opportunity to be heard orally by the examiner regarding the 50 percent provision is not a defect requiring reversal since all the requirements of a proper administrative hearing were met prior to the issuance of the final order.

> "* * * When there is an appeal to the Board, the findings, conclusions, and orders of the examiner are only tentative or interlocutory in nature. And in such cases it is the orders of the Board which are final and appealable. Thus as long as the requirements of a full hearing are satisfied at some time prior to the issuance of a final order, there can be no complaint on that ground." Sisto v. C.A.B., 179 F.2d 47, 51 (D.C.Cir. 1949).

If petitioners felt it was necessary to introduce evidence before the examiner relating to the 50 percent provision, they could have asked the Commission to reopen the case. Federal Trade Commission v. National Lead Co., supra,

352 U.S. at page 428. Furthermore, the order itself provides that the 50 percent limitation only applies "except to the extent that iron and steel scrap, adequate in quantity and quality, is not available from other suppliers on terms which are substantially similar and competitive with the terms offered by respondent Luria Brothers & Company, Inc."

We do not view the order as an affirmative command which seeks to regulate the conduct of business. It calls for the petitioning mills to cease and desist from purchasing more than 50 percent of their annual scrap requirements for their respective plants from Luria. This is a prohibition not an affirmative command, but even if considered an affirmative directive, it would not, on that ground, be invalid. L. Heller & Son v. Federal Trade Commission, 191 F.2d 954 (7 Cir. 1951); Bantam Books, Inc. v. Federal Trade Commission 275 F.2d 680 (2 Cir. 1960), cert. denied 364 U.S. 819 (1960); Haskelite Mfg. Corp. v. Federal Trade Commission, 127 F.2d 765 (7 Cir. 1942).

Some of the smaller mills such as Bucyrus and Edgewater object to their inclusion in the Commission's order, claiming that their purchases are too insignificant to be unlawful. We cannot separately view individual purchases by those mills whose annual requirements are not quantitatively significant. All contribute to the unlawful result and all should share in the consequences. In Modernistic Candies v. Federal Trade Commission, 145 F.2d 454 (7 Cir. 1944), the Commission prohibited the distribution of ballgum boards which were used as gambling devices. The manufacturer of the boards was held liable even though the manufacture of the boards was not per se illegal. The court stated: "We have also held that those who aid and

abet such a method of merchandising, those participes criminis with gamblers and their schemes, are likewise engaged in unfair trade practices contrary to public policy." Modernistic Candies v. Federal Trade Commission, supra, 145 F. 2d at page 455. The sound principle there upheld sharply applies to the situation before us.

THE SOUTHWEST ACQUISITION

Petitioners, Luria and Southwest, urge error in the Commission's finding of a violation of Section 7 of the Clayton Act, 15 U. S. C. § 18, which provides in pertinent part:

> "No corporation engaged in commerce shall acquire * * * the stock * * * or * * * assets of another corporation * * * where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The United States Supreme Court in numerous opinions has discussed the meaning of Section 7. United States v. Penn-Olin Co., 378 U. S. 158 (1963); United States v. Alcoa, 377 U. S. 271 (1963); United States v. Philadelphia Nat. Bank, supra, 374 U. S. 321; Brown Shoe Co. v. United States, 370 U. S. 294 (1961); United States v. du Pont & Co., 353 U. S. 586 (1956). These decisions and others indicate that Section 7 is directed at both the present and prospective effects of corporate acquisitions. In United States v. du Pont & Co., supra, 353 U. S. at page 592, the Court stated:

> "We hold that any acquisition by one corporation of all or any part of the stock of another corpo-

> ration, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce."

The opinion continues, quoting with approval from this Court's opinion in Transamerica Corp. v. Board of Governors, 206 F. 2d 163, 169 (3 Cir. 1953) as follows:

> "A monopoly involves the power to * * * exclude competition when the monopolist desires to do so. Obviously, under Section 7 it was not necessary * * * to find that * * * (the defendant) has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly in the bud. Since by definition monopoly involves the power to eliminate competition a lessening of competition is clearly relevant in the determination of the existence of a tendency to monopolize. Accordingly in order to determine the existence of a tendency to monopoly in * * * any * * * line of business the area or areas of existing effective competition in which monopoly power might be exercised must first be determined." United States v. du Pont & Co., supra, 353 U. S. at page 592.

See also: Brown Shoe Co. v. United States, supra, 370 U. S. at page 317.

Finding a violation of Section 7 the Commission agreed with the hearing examiner's determination of the relevant market. The "area of effective competition" within which

competition must be substantially lessened in order to sustain a violation of the Clayton Act "must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')." Brown Shoe Co. v. United States, supra, 370 U. S. at page 324. Tampa Electric Co. v. Nashville Coal Co., 365 U. S. 320 (1961); United States v. Philadelphia Nat. Bank, supra, 374 U. S. at page 356; United States v. du Pont & Co., supra, 353 U. S. at page 593.

The record reveals that prior to the acquisition, Luria and Southwest were the two largest suppliers in the Pittsburgh-Youngstown area. They both sold in the same area and to the same customers. The evidence further shows that the Pittsburgh-Youngstown area was the proper section of the country to examine in order to weigh the effect the acquisition would have on commerce. Tampa Electric Co. v. Nashville Coal Co., supra. This is apparant because the mills in that section of the country were supplied by the brokerage houses in the area due to the prohibitive costs of transportation. See United States v. Philadelphia Nat. Bank, supra, 374 U.S. at page 358. The Commission was also correct in its evaluation of the proper line of commerce, i.e., broker-dealer scrap. (See discussion supra p. 16).

Definitely the acquisition had a substantial effect on competition. Whereas prior to the acquisition Luria supplied 26 percent and Southwest 6 percent of the total broker-dealer scrap purchased by the reporting mills in the district, after the acquisition the share of the combine rose to 37 percent. Significant in this regard is the statement by the Supreme Court in United States v. Philadelphia Nat. Bank, supra, 374 U.S. at page 363:

> "This intense congressional concern with the trend toward concentration warrants dispensing, in

> certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. See United States v. Koppers Co., 202 F.Supp. 437 (D.C.W.D. Pa. 1962)."

The decision went on to show that although the Court expressed no opinion on the smallest market share that would threaten undue concentration, it was felt that the 30 percent present in the case before the Court was sufficient. In United States v. Alcoa, supra, the Supreme Court found that Section 7 was violated when Alcoa, the leading producer with 27.8 percent of the market acquired another company which accounted for only 1.3 percent. Since after the acquisition by Luria, its sales combined with those of Southwest encompassed 37 percent of the relevant market, this aspect of the case falls squarely within the percentages prohibited in prior decisions.

Luria also challenges the authority of the Commission to issue that part of its order which requires petitioner to divest itself of "All assets, properties, rights and privileges, tangible and intangible, acquired from Southwest Steel Corporation since December 29, 1950; * * *" Luria's reliance on cases such as FTC v. Western Meat Co., Thatcher Manufacturing Co. v. FTC and Swift & Co. v. FTC, 272 U.S. 554 (1926) and Arrow-Hart & Hegeman

Electric Co. v. Federal Trade Commission, 291 U.S. 587 (1934) is misplaced since those authorities dealt with the Clayton Act prior to its amendment in 1950. Section 11 of the Clayton Act, 15 U.S.C. § 21(b) grants the Commission the power to order the divestiture of assets as well as stock. It provides in part:

> "* * * If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held * * * contrary to the provisions of section * * * 7 * * * of this Act, * * * in the manner and within the time fixed by said order."

See United States v. Philadelphia Nat. Bank, supra, 374 U.S. at pages 339-40, n. 17.

Reynolds Metals Co. v. Federal Trade Commission, 309 F.2d 223 (D.C. Cir. 1962) is readily distinguishable from the one at bar. In Reynolds the court modified the Commission's divestiture order by excluding a plant constructed by Reynolds, the acquiring corporation, after the illegal acquisition. The plant in Reynolds was not an asset of the acquired company but was a structure built by Reynolds with its own funds. Here the Commission's order is directed at assets which were obtained by Luria from Southwest as a result of the illegal acquisition.

Luria also argues that the Commission's five year ban on future acquisitions is too punitive especially since the

Commission only found one illegal acquisition during the whole period Luria was in existence. Beyond all doubt the Commission has the power to enjoin future acquisitions. United States v. Crescent Amusement Co., 323 U.S. 173, 186 (1944); United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 575 (D.C.E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961). The record makes it plain that the Commission's order is based on many factors other than past acquisitions. Furthermore, the order is not a blanket ban since it suggests the Commission will allow future acquisitions within the five year period if Luria can show that "* * * the planned acquisition will not unduly restrain competition."

Petitioners would have us remand this cause to the Commission on the grounds that the record is stale and should be brought up to date before a ruling on the merits is rendered. From our study of this exhaustive record we are convinced that we have before us a thorough exposition of the permanent conditions in the scrap brokerage industry here involved. Although the proceedings in this action of necessity have been prolonged, the solid overall picture presented by the record calls for a final decision thereon at this time and not for its return to the Commission.

We have reviewed at length the other objections raised by petitioners in their joint and individual briefs and find them without merit.

The order of the Federal Trade Commission will be affirmed in its entirety.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Order Providing for the Filing of Exceptions to Proposed Final Order (November 15, 1962)

UNITED STATES OF AMERICA
BEFORE
FEDERAL TRADE COMMISSION

COMMISSIONERS:
Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

DOCKET No. 6156

ORDER PROVIDING FOR THE FILING OF EXCEPTIONS TO PROPOSED FINAL ORDER

In the Matter of

LURIA BROTHERS AND COMPANY, INC., a corporation,
SOUTHWEST STEEL CORPORATION, a corporation,
BETHLEHEM STEEL CORPORATION, a corporation,
BETHLEHEM STEEL COMPANY, a corporation,
BETHLEHEM PACIFIC COAST STEEL CORPORATION, a corporation,
UNITED STATES STEEL CORPORATION, a corporation,
NATIONAL STEEL CORPORATION, a corporation,
WEIRTON STEEL COMPANY, a corporation,
THE COLORADO FUEL AND IRON CORPORATION, a corporation,
JOHN A. ROEBLING'S SONS CORPORATION, a corporation,
CENTRAL IRON AND STEEL COMPANY, a corporation,
PHOENIX IRON AND STEEL COMPANY, a corporation,
GRANITE CITY STEEL COMPANY, a corporation,
LUKENS STEEL COMPANY, a corporation,
DETROIT STEEL CORPORATION, a corporation,
MCLOUTH STEEL CORPORATION, a corporation,
BALDWIN-LIMA-HAMILTON CORPORATION, a corporation,
EDGEWATER STEEL COMPANY, a corporation,
BUCYRUS-ERIE COMPANY, a corporation,
COLUMBIA MALLEABLE CASTINGS CORPORATION, a corporation,
HUGO NEU CORPORATION, a corporation.

Order Providing for the Filing of Exceptions to Proposed Final Order (November 15, 1962)

The Commission having rendered its decision in part adopting and in part modifying the initial decision and the order to cease and desist contained therein and having determined that pursuant to § 4.22(c) of the Commission's Rules of Practice respondents should be afforded the opportunity to file exceptions to certain paragraphs of the Commission's Proposed Final Order:

IT IS ORDERED that respondents may, within twenty (20) days after service upon them of this order and attached Opinion Of The Commission, file with the Commission their exceptions to any provisions of numbered paragraphs 1, 2, and 4 of the hereinafter set out Proposed Final Order, a statement of their reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision; and that counsel supporting the complaint may, within ten (10) days after service of respondents' exceptions, file a statement in reply thereto supporting the proposed order.

IT IS FURTHER ORDERED that if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said Proposed Final Order shall then become the final order of the Commission.

PROPOSED FINAL ORDER

1. IT IS ORDERED that the respondent broker, Luria Brothers & Company, Inc., its officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the sale of iron and steel scrap in commerce, do forthwith cease and desist from:

Contracting or agreeing to act or acting as exclusive or substantially exclusive broker or supplier of iron

and steel scrap for any plant or plants of any respondent mill or of any other buyer of iron and steel scrap not a party hereto, and from inducing or receiving preferential status or favored treatment of any nature as broker or supplier of iron and steel scrap for any respondent mill or any other buyer of iron and steel scrap.

2. IT IS FURTHER ORDERED that the respondent mills, Bethlehem Steel Corporation, Bethlehem Steel Company, Bethlehem Pacific Coast Steel Corporation, United States Steel Corporation, National Steel Corporation, Weirton Steel Company, The Colorado Fuel and Iron Corporation, John A. Roebling's Sons Corporation, Phoenix Iron & Steel Company, Granite City Steel Company, Lukens Steel Company, Detroit Steel Corporation, McLouth Steel Corporation, Baldwin-Lima-Hamilton Corporation, Edgewater Steel Company, Bucyrus-Erie Company, and Grinnell Corporation, their respective officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the purchase of iron and steel scrap in commerce, do each forthwith cease and desist from:

(a) Purchasing, or contracting or agreeing to purchase, all or substantially all of the iron and steel scrap requirements of any plant or plants from or through respondent Luria Brothers & Company, Inc., and from giving preferential status or favored treatment of any nature to said broker, as broker or supplier of iron and steel scrap.

Order Providing for the Filing of Exceptions to Proposed Final Order (November 15, 1962)

(b) During a period of five (5) years from the date this order shall become final, purchasing in excess of 50% of the annual requirements of purchased iron and steel scrap of any plant or plants from respondent Luria Brothers & Company, Inc., except to the extent that iron and steel scrap, adequate in quantity and quality, is not available from other suppliers on terms which are substantially similar and competitive with the terms offered by respondent Luria Brothers & Company, Inc.

3. IT IS FURTHER ORDERED that respondent Luria Brothers & Company, Inc., its officers, agents, representatives and employees, acting separately or in combination with anyone else, whether a party to this proceeding or not, directly or through any corporate or other device, do forthwith cease and desist from:

Entering into, continuing, cooperating in, or carrying out any express or implied understanding, agreement, combination or conspiracy with any steel producing company or group of steel producing companies beyond the continental limits of the United States, or any buying organization, agent or other buyer acting for or on behalf of such steel producing companies, to act as the exclusive or substantially exclusive broker or supplier for such company or companies, of iron and steel scrap obtained in the continental United States or within the territorial jurisdiction of the United States.

4. IT IS FURTHER ORDERED that respondent Luria Brothers & Company, Inc., do forthwith cease and desist from:

Order Providing for the Filing of Exceptions to Proposed Final Order (November 15, 1962)

During a period of five (5) years from the date this order shall become final, acquiring, directly or indirectly, through subsidiaries or in any other manner, the assets, stocks, share capital, or any other interest in any business, corporate or otherwise, which is engaged in the business of buying or selling iron and steel scrap as a broker or dealer, unless and until the Commission, upon application and proper showing in support thereof, shall first find that the planned acquisition will not unduly restrain competition.

5. IT IS FURTHER ORDERED that respondent Luria Brothers & Company, Inc., do forthwith divest itself absolutely, in good faith, of:

(a) All stock or other share capital, and all control over or interest in all stock or other share capital of Southwest Steel Corporation; and

(b) All assets, properties, rights and privileges, tangible and intangible, acquired from Southwest Steel Corporation since December 29, 1950; together with any assets or other properties of whatever description that may have been added thereto since December 29, 1950, as may be necessary to restore said corporation to at least the same operating condition that existed, and competitive position that it occupied, when its assets or properties were so acquired, so as to retain neither directly nor indirectly any of the fruits of such acquisition.

IT IS FURTHER ORDERED that in the divestiture hereinbefore mentioned, none of the stock, assets, properties, rights or privileges to be divested shall be sold or trans-

ferred, directly or indirectly, to anyone who at the time of the divestiture is a stockholder, officer, director, employee, or agent of, or is otherwise directly or indirectly connected with, or under the control or influence of, respondent Luria Brothers & Company, Inc., or of any of said respondent's subsidiary, affiliated or related companies.

6. IT IS FURTHER ORDERED that the complaint be, and the same hereby is, dismissed as to respondents Southwest Seel Corporation and Hugo Neu Corporation, and as to those allegations or portions thereof as have been found not to have been sustained by the evidence.

IT IS FURTHER ORDERED that respondents shall, within ninety (90) days from the date of service upon them of this order, submit in writing for the consideration and approval of the Federal Trade Commission their plans for compliance with this order, including the date within which compliance can be effected.

IT IS FURTHER ORDERED that the hearing examiner's initial decision as modified and supplemented by the accompanying opinion and this order be, and it hereby is, adopted as the decision of the Commission.

By the Commission, Commissioner Elman dissenting and Commissioners MacIntyre and Higginbotham not participating.

SEAL

JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

ISSUED: November 15, 1962

Attached is dissenting opinion by Commissioner Elman.

Opinion of the Commission (November 15, 1962)

UNITED STATES OF AMERICA
BEFORE
FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of LURIA BROTHERS AND COMPANY, INC., a corporation, et al.	Docket No. 6156

OPINION OF THE COMMISSION

By Anderson, Commissioner:

This matter is before the Commission for consideration of the cross-appeals of the parties from the hearing examiner's initial decision which in part dismissed and in part upheld the complaint.

The Commission's complaint herein was issued January 19, 1954. It was subsequently amended on July 13, 1954, and again on April 16, 1956. Hearings began January 12, 1955, and continued thereafter at intervals until May 14, 1958. During the 113 days of hearing, 250 witnesses testified, producing a transcript in exces of 14,000 pages. More than 1,300 exhibits, many having a multiple number of pages, were received in evidence.

Opinion of the Commission (November 15, 1962)

Because of the extraordinary circumstances presented by this highly complicated matter, the hearing examiner departed from the usual Commission procedure of requiring all parties to make simultaneous filing of their proposed findings, conclusions and order, and directed complaint counsel to file theirs on November 10, 1958, while respondents were not required to file until they had had the opportunity to examine complaint counsel's filing. The respondents submitted their proposed findings on various dates up to January 13, 1959; and thereafter, until March 20, 1959, the parties were permitted to file cross-replies. The hearing examiner then took the matter under advisement.

The hearing examiner's initial decision was filed on March 29, 1961. In its 359 pages, the facts of record are painstakingly analyzed and concluded upon. While all parties have appealed, it is significant that relatively few exceptions are taken to the purely factual findings. We have reviewed the record in the light of the arguments advanced in the briefs, and the oral argument heard on November 21, 1961; and it is our decision that with the exception of the modifications noted herein the initial decision of the hearing examiner should be, and is, adopted as the decision of the Commission.

The Respondents

Two of the respondents herein, Luria Brothers & Company, Inc. (hereinafter sometimes referred to as Luria), and its subsidiary, Southwest Steel Company (hereinafter sometimes referred to as Southwest), are primarily engaged in the business of buying iron and steel scrap and reselling it to consumers who melt it down to produce "new" iron or steel. Luria and Southwest and other companies performing a similar function are known and referred to in the steel

industry as "brokers." It should be pointed out that the term "brokers" as applied in this industry is somewhat inaccurate since these brokers are actually jobbers or wholesalers, buying scrap for their own accounts from dealers, industrial plants, railroads and others, and reselling it at a profit.

In certain market areas Luria is also engaged as a scrap "dealer." The distinction between a dealer and a broker is, at best, a tenuous one. Brokers ordinarily do not take physical possession of the scrap they deal in and can, and frequently do, operate without facilities other than an office. Dealers, on the other hand, usually take physical possession of scrap and operate "yards" wherein scrap is sorted, processed and stored. The chain of commerce ordinarily finds dealers selling to brokers, but they also quite frequently sell directly to consumers and, thus, directly compete with brokers.

Respondent Hugo Neu Corporation is primarily engaged in the importing and exporting of metals. This matter is concerned with Neu's activities as a broker buying scrap in the United States and selling it abroad.

The remainder of the respondents herein are consumers of scrap, operating furnaces wherein scrap or a combination of scrap and pig iron is melted down to produce "new" steel or iron. This group of consuming respondents is frequently referred to herein as "respondent mills," although in a strictly technical sense not all of them are mills as that term is used in the steel industry.

Certain respondent mills—Bethlehem Steel Company, Central Iron & Steel Company (now known as Phoenix Iron & Steel Company), Colorado Fuel and Iron Corporation (an original respondent herein and successor by merger to respondent John A. Roebling's Sons Corpora-

tion), Detroit Steel Corporation, Granite City Steel Company, McLouth Steel Corporation, Phoenix Iron & Steel Company, United States Steel Corporation and Weirton Steel Company—are fully integrated steel companies, i.e., they operate blast furnaces which produce pig iron (used in making steel) and also operate facilities for the production of semi-finished and finished steel from ingots. Other respondent mills—Bethlehem Pacific Coast Steel Corporation (now Pacific Coast Division of Bethlehem Steel Company), Edgewater Steel Company and Lukens Steel Company—are semi-integrated steel companies, which do not operate blast furnaces but do produce ingots and have finishing facilities. The remaining respondent mills—Baldwin-Lima-Hamilton Corporation, Bucyrus-Erie Company and Grinnell Corporation (formerly known as Columbia Malleable Castings Corporation)—operate iron or steel foundaries to supply their own manufacturing or fabricating operations.

Bethlehem Steel Corporation and National Steel Corporation are not producers of iron and steel. The former's connection with this proceeding arises from its ownership of all the stock of Bethlehem Steel Company (and that of Bethlehem Pacific Coast Steel Corporation prior to its merger into Bethlehem Steel Company) while the latter's connection arises from its ownership and control of Weirton Steel Company.

While respondent mills account for a large percentage of the country's total iron and steel production, they do not include many significant integrated steel companies and a large number of small iron or steel foundries. It is estimated that the scrap purchases of respondent mills represent approximately 22% of the total scrap received by all domestic scrap consumers.

Opinion of the Commission (November 15, 1962)

The Charges

The complaint is divided into two counts which contain no less than twenty separate charges of unfair practices. While all of the alleged unfair acts and practices are related in the sense that they allegedly unlawfully benefited Luria, they can be conveniently separated into four broad categories for the purpose of discussion.

The first group of charges is contained in Paragraph Nine of Count I. In subsections (a) and (b) thereof it is alleged that Luria and the mill respondents violated the Federal Trade Commission Act by entering agreements or understandings pursuant to which each mill purchased all or substantially all of its scrap requirements from Luria. Subsections (c) through (j) of Paragraph Nine charge as separate unfair practices eight acts or practices utilized by Luria or the mill respondents to effect and further their alleged agreements. Paragraph Nine contains all of the charges made against respondent mills.

A second series of allegations is contained in Paragraph Twelve of Count I. In this section, respondents Luria and Neu are charged with having violated the Federal Trade Commission Act by conspiring among themselves and with others to restrain competition and create a monopoly in the export scrap market.

The third charge is found in subparagraph (b) of Paragraph Eleven in Count I and in the whole of Count II. The charge here made is that Luria has effected a probable lessening of competition and tendency toward monopoly by acquiring all or a substantial part of the stock of certain corporations engaged in business as scrap brokers or dealers. The reason for the separation of the complaint into two

counts is here apparent. Count II is brought under a different act, Section 7 of the Clayton Act (38 Stat. 731 and the amended section, 64 Stat. 1125), while Count I is entirely founded upon the Federal Trade Commission Act. Thus, the same acquisitions are charged as violative of two statutes.

A final group of charges is contained in Paragraph Ten and in subparagraph (a) of Paragraph Eleven of Count I. In these sections, Luria is charged with a variety of alleged unfair acts or practices which are more or less independent of the charges made in other sections but which were pursued "for the purpose and with the effect" of reducing competition and creating a monopoly.

The Nature of the Violations Charged

At the outset it must be emphasized that this is a proceeding brought to arrest in their incipiency acts and practices which, if allowed to continue, would eventually produce a monopoly in the respondent Luria Brothers & Company, Inc. The complaint charges violations of the Federal Trade Commission Act and Section 7 of the amended Clayton Act. This latter statute, in contrast with Section 5 of the Federal Trade Commission Act, deals with a defined and limited type of unlawful practice, the acquisition of the stock or assets of other corporations with probable anti-competitive effects. Thus, while respondent Luria argues strenuously that its acquisitions do not violate the Clayton Act, there is no dispute as to the nature of the charge made in complaint Count II.

On the other hand, the widest possible dichotomy of views exists as to the nature of the charges made in complaint Count I, and this is particularly true of the charge made in Paragraph Nine of Count I. Respondents argue that the practices indicted by Paragraph Nine of the complaint are exclusive dealing arrangements of the type specifically covered by Section 3 of the Clayton Act[1] and that, therefore, it is incumbent upon complaint counsel to adduce evidence in support of this paragraph which would be sufficient to satisfy a burden coextensive with the burden created by Section 3. Their brief phrases the argument in these words: "In a case in which Section 5 of the Federal Trade Commission Act is invoked against a practice for which criteria of legality are specifically prescribed in the Clayton Act, legality must be determined under the standards of the particular section of the Clayton Act relating to such practice." This argument has two weaknesses.

---

[1]This section provides:

"Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

In the first place, it is legally untenable since the Supreme Court has very clearly held that acts or practices which are not sufficiently mature to violate the Sherman or Clayton Acts may violate the Federal Trade Commission Act.[2] In support of their argument, respondents cite various antitrust writers and the *Report Of The Attorney General's Committee To Study The Antitrust Laws.*[3] The fact is that the opinions expressed in these unofficial writings are in direct conflict with the legal precedents we are bound to follow.

The second defect in respondents' argument is in its major premise that the charge made in Paragraph Nine is basically an "exclusive dealing" charge of the type countenanced by Section 3. The complaint cannot be so narrowly confined. It is directed against a much broader target than the relatively concise restraint encompassed by Section 3. This proceeding was not brought under Section 5 of the Federal Trade Commission Act because of jurisdictional strictures of the Clayton Act, but rather because the practices and acts here involved bear only superficial resemblance to those within the aegis of the latter statute. The goal of the complaint as a whole, and Paragraph Nine in particular, is to raise a roadblock in the path of monopoly.

The potential monopolizer at which the complaint is primarily aimed is respondent Luria. The respondent mills are named in this proceeding because they allegedly conspired with and aided and abetted Luria and because an

---

[2]*Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U. S. 392 (1953).

[3]Transmitted to the Attorney General March 31, 1955.

order to cease and desist which did not include the mill respondents would be ineffective.[4]

This proceeding was brought to arrest an incipient monopoly, to enjoin activity which, if undeterred, would violate Sections 1 and 2 of the Sherman Act.[5] That Section 5 was specifically designed for this purpose is too well established for discussion.[6]

Monopolization violative of the Sherman Act exists when a single trader has intentionally acquired the power to control market prices or to exclude competitors. Such a condition is unlawful and there is no need to show that the power over prices or the market has, in fact, been exercised. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 811 (1946).

---

[4]The hearing examiner concluded: "Such arrangements cannot be effectively terminated unless the buyers, as well as the seller, are ordered to cease and desist therefrom." (Initial Decision at 342.)

[5]"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . .

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[6]*Fashion Originators Guild of America, Inc., et al* v. *Federal Trade Commission,* 312 U. S. 457, 456 (1941); *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 647 (1931); *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453 (1922).

See also *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 434-435 (1920). (Dissenting opinion of Justice Brandeis.)

At page 335 of the initial decision the hearing examiner correctly concludes: ". . . this proceeding does not involve a charge of monopolization under Section 2 of the Sherman Act. . . ." We agree that such a charge is not made in the complaint and, of course, cannot be contemplated at this juncture. But "monopolization" is not the only practice made unlawful by Section 2. The section condemns with equal emphasis any "attempt to monopolize" or to "combine or conspire . . . to monopolize." Thus, the act inveighs against monopoly and any deliberate conduct through which it may be accomplished. Such conduct is well within the purview of this complaint which charges that respondents entered "combinations, and conspiracies for the purpose and with the effect of lessening, . . . competition, and tending to create a monopoly. . . ."

An attempt to monopolize is established by proof that the respondent or defendant acted with deliberation and purpose, i.e., with "specific intent."[7] The existence of "specific intent" is a conclusion based upon an examination of the business practices pursued by the potential monopolist.[8] Some actions which clearly indicate deliberateness are the pursuit of acts and practices which violate other provisions of the antitrust laws such as entering agreements constituting restraints forbidden by Section 1 of the Sherman Act[9] or making acquisitions violative of Section 7 of the Clayton Act.[10] And it follows as a logical corollary that engaging in unfair or deceptive acts or practices within the scope of Section 5 of the Federal Trade Commission Act shows the existence of deliberateness. In this connection, Judge

---

[7] *Swift & Co.* v. *United States*, 276 U. S. 311 (1928).
[8] *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208 (1939).
[9] *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949).
[10] *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 532 (1948).

Wyzanski's language in *Union Leader Corp.* v. *Newspapers of New England, Inc., et al.*,[11] is particularly apt:

> ". . . to prove that a person has that type of exclusionary intent which is condemned in antitrust cases there must be evidence that the person who foresees a fight to the death intends to use or actually does use unfair weapons. Putting the same idea in another way, we may say that there is no sharp distinction between (a) the existence of an intent to exclude and (b) the use of unfair means."

While in Section 2 cases involving combinations or conspiracies to monopolize it is necessary to show intent, its proof merges into the proof of unlawful conspiracy. In *American Tobacco Co.* v. *United States*,[12] the Supreme Court, after stating that the existence of power to exclude competitors from a market is unlawful provided there exists the "intent and purpose to exercise that power," held:

> "Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy."

From the *Tobacco* case we also learn that the distinction between a trade restraining conspiracy forbidden by Section 1 of the Sherman Act and a conspiracy to monopolize violative of Section 2 is dependent upon the appetite of the conspirators. If their agreement "may stop short of monopoly" they violate only Section 1. If they are not "content

---

[11]180 F. Supp. 125, 140 (D. Mass. 1959).
[12]328 U. S. 781, 809 (1945).

with restraint short of monopoly" both sections are violated.[13]

Whether the charge be attempted monopolization or conspiracy to monopolize, it is necessary to determine with some exactness the market wherein the practices occurred. The criteria for the determination of the relevant market are essentially the same whether the case is brought under either the Sherman, Clayton, or Federal Trade Commission Acts. There are two principal facets to the concept of relevant market: the product involved and geographic area.[14] The limits of each element must be determined with particularity since they together constitute both the battleground and the spoils in the battle of competition.

In summary, then, it is our view that proof of the violations charged by this complaint entails a showing: (1) that the respondents engaged in the various acts and practices described in the complaint; (2) for the purpose of restraining or monopolizing any part of trade or commerce; and (3) that respondents have either realized their objective or are likely to reach it if undeterred by an order to cease and desist.

The Alleged Unlawful Agreements Between Luria and the Mill Respondents

The central charge of the complaint is contained in Paragraph Nine, and, in particular, in subsections (a) and (b) thereof. The charge there made reads as follows:

---

[13]Id. at 788.

[14]The statute writers use different terms to describe the relevant market. In Section 7 of the Clayton Act it is described as "any line of commerce in any section of the country." In Section 2 of the Sherman Act the authors succinctly refer to it as "any part of the trade or commerce among the several States, or with foreign nations."

". . . Respondent brokers and respondent mills and other mills have entered into express and implied understandings, agreements, combinations, and conspiracies for the purpose and with the effect of lessening, hindering, restraining and suppressing competition, and tending to create a monopoly in respondent brokers in the interstate purchase and sale of iron and steel scrap. Pursuant to said understandings, agreements, combinations, and conspiracies, and in furtherance thereof, respondent brokers and respondent mills and other mills have acted and continue to act in concert and in cooperation in doing and performing the following methods, acts, and practices:

(a) Respondent brokers entered into understandings, agreements, and conspiracies with respondent mills and other mills to act as exclusive or substantially exclusive scrap brokers for said mills.

(b) Respondent mills and other mills agreed to and did make all or substantially all of their iron and steel scrap purchases from respondent brokers."

Paragraph Nine contains eight additional subparagraphs lettered (c) through (j). These additional paragraphs charge as separate unfair trade practices the various steps and procedures which the respondents allegedly pursued to effect the agreements described in subparagraphs (a) and (b). The hearing examiner disposed of these additional charges in two different manners. With repsect to subparagraphs (c), (d) and (e), he found that

some, but not all, of the mill respondents had, in fact, engaged in these practices.[15] However, the examiner entered no prohibition against these practices in his order to cease and desist because, even though proven, he did not regard them "as unfair practices in themselves." He considered them as "evidentiary indicia" of the existence of the type of agreements charged as unlawful in subparagraphs (a) and (b). He concluded, therefore, that an order directed against the practices described in subparagraphs (a) and (b) would insure the discontinuance of these practices. We agree with this analysis and decision.

The hearing examiner gave detailed consideration to the charges made in subparagraphs (f) through (j) of Paragraph Nine and concluded that the charges made therein had not been sustained. Our review of the evidence adduced in support of these allegations revealed no error in the hearing examiner's disposition of them. We affirm and adopt his findings and conclusions with respect thereto.

In addition, it would appear that the charges made in subparagraphs (i) and (j) are substantially moot since they deal with practices which took place when scrap was in short supply and regulated and allocated by the Office of Price Stabilization and the National Production Authority. Since the unlawful acts there charged depend upon the existence of such regulations and there is no present reason to believe that they will soon be reinstituted, there is no demonstrated need for an order to cease and desist.

As the initial decision points out, the complaint is susceptible of being interpreted as charging a conspiracy or agreement between the mill respondents to appoint Luria

[15]The hearing examiner in error treated subparagraph (e) as if it contained a charge against respondent mills, when, in fact, it is directed only against respondent Luria.

as their exclusive broker. We concur with the hearing examiner's conclusion that the record lacks reliable and substantial evidence to support such a charge. The most that can be said of the evidence is that it indicates that several of the respondent mills were aware, at the time that they entered exclusive agreements with Luria, that other mill respondents had similar agreements with Luria. The evidence is summarized by complaint counsel at page 100 of their brief. After admitting that there is no overt or direct evidence of conspiracy between the mills, the brief states:

> "There is direct evidence, however, that certain of the respondent mills selected Luria as their exclusive broker because Luria was also the exclusive broker for certain of their competitors, and that they did so for the purpose of lessening competition in the purchase of scrap. There is also evidence from which it must be inferred that all of the other respondent mills knew that Luria was the exclusive broker for the respondent mills, and other mills, with which they competed in the purchase of scrap, and that they continued their exclusive dealing agreements with Luria largely for the purpose of lessening competition in the purchase of scrap. These circumstances are sufficient to warrant a finding of conspiracy among the respondent mills to use Luria as their common exclusive broker for the purpose and with the effect of lessening competition."

Even taking the brief's description of the facts at full face value we cannot agree that the related circumstances are sufficient to warrant a finding of conspiracy among the

respondent mills. There is no substantial evidence to support an inference that the mill respondents ever came to an expressed or tacit meeting of the minds or understanding as to purchasing from Luria. The fact that they may have been identically motivated with respect to Luria is an insufficient basis for a finding of conspiracy.

As stated above, we consider the charges made in subparagraphs (a) and (b) of complaint Paragraph Nine as directed against incipient Sherman Act violations. We do not view this proceeding as one which, except for obvious jurisdictional difficulties, would ordinarily be brought under Section 3 of the Clayton Act. It will be noted that the preamble paragraph of Paragraph Nine charges intent, that the agreements were entered "for the purpose and with the effect" of restraining competition and tending to create a monopoly in respondent Luria. Purpose or intent is an element foreign to the Clayton Act, and among the antitrust laws is found only in the Sherman Act.[16]

The hearing examiner does not make his position crystal-clear as to the theory of these charges. He finds that Luria's contention that it does not possess monopoly power is "largely irrelevant since this proceeding does not involve a charge of monopolization under Section 2 of the Sherman Act where proof of monopoly power is necessary." He does not, however, clearly eliminate the incipient Sherman Act theory since he points out that Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act are *in pari materia* insofar as they involve the concept of agreements or conspiracy. He also discusses the fact that in cases brought

[16] "Purpose of destroying competition or eliminating a competitor" is an element of a violation of Section 3 of the Robinson-Patman Act, but it is not an antitrust law. *Nashville Milk Co.* v. *Carnation Co.*, 355 U. S. 373 (1958).

under Section 2 of the Sherman Act where the charge involves an attempt to monopolize or a combination or conspiracy to monopolize rather than actual monopolization there is no necessity to show that actual monopoly power was acquired.

However, on balance, it would appear that the hearing examiner relies in the main upon a Section 3 theory. He discusses at some length the possible liability of buyers under Section 3, concluding "Since the arrangements between Luria and the mills are of the type covered by Section 3 or are at least economically equivalent thereto, to the extent such arrangements have the proscribed effect the buyers may be held accountable under Section 5 of the Federal Trade Commission Act, even though their activities may not be reachable under Section 3 of the Clayton Act because of the technical wording thereof."[17] A principal clue to the examiner's theory is found in his failure to make the necessary finding in a Section 2 Sherman Act type proceeding that the acts and practices of the respondent were pursued deliberately with the intent to effect a monopoly.

Actually, the difference between our view and that of the hearing examiner is not as great as may at first appear. As he pointed out, Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act can be, and frequently are, brought to bear in exclusive dealing situations. In other words, an exclusive dealing arrangement has with frequency been held to be a conspiracy in restraint of trade violative of Section 1 of the Sherman Act or a conspiracy or attempt to monopolize trade violative of Section 2. Of course, a somewhat different burden of proof is required dependent upon which Act is charged.[18]

---

[17]Initial decision at 339.

[18]*Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594 (1953).

Opinion of the Commission (November 15, 1962)

While our view of the applicable law is somewhat divergent from that held by the hearing examiner, we are in full agreement with his findings and conclusions as to the facts concerning this charge of unlawful agreement between Luria and the respondent mills. He found that while Luria had been a substantial factor in the scrap business in 1945, its principal strength was confined to the eastern United States. In ten years time it extended its operations and became a dominant factor in other sections of the country, including the St. Louis area, the Rocky Mountain area and the West Coast. During this period it progressed from being a major factor in the eastern United States to being "far and away" the dominant factor in the scrap business in that section. Its remarkable rise in each of these areas was due, for the most part, to the series of exclusive supply arrangements which it had with the respondent mills and other large scrap consumers.

With several exceptions, there are no formal contracts between Luria and the respondent mills requiring the mills to deal exclusively with Luria. Bethlehem Pacific Steel Corporation and United States Steel Corporation did enter written exclusive dealing contracts. The answer of Colorado Fuel and Iron Corporation ". . . admits that on or about June 1, 1946, it entered into an oral understanding with respondent Luria, pursuant to which said Luria was to act as exclusive scrap broker solely for respondent Colorado's mill at Pueblo, Colorado, and . . . said oral understanding continues in effect. . . ." Respondent Granite City Steel Company advised the Commission in writing: "In April 1950 we gave Luria Brothers & Company, Inc., an agreement for the exclusive supplying of our scrap requirements."

For the most part, however, the existence of the exclusive agreements or understandings is established by the tes-

timony and documents of record. There is ample evidence to show that the respondent mills looked to Luria and considered Luria obligated to keep their mills supplied with scrap and that Luria understands and accepts this obligation. For example, the vice-president in charge of scrap buying of McLouth Steel Corporation stated in a letter to Luria: "As you know our scrap inventory position is very critical and you have been charged with the responsibility of keeping this plant in operation. We are depending on you to continue to take care of our requirements." The scrap buyer for the Standard Steel Works Division of respondent Baldwin-Lima-Hamilton Corporation testified that he expected Luria to supply the grades and quantities of scrap which he required and that Luria understood what was expected of them. The man who was purchasing agent for Lukens Steel Company in 1929, when it commenced buying exclusively from Luria, testified: ". . . we made no contract or any such agreement; written agreement anyhow. It may have been oral."

Although respondent Bethlehem Steel Company insists it has no agreement with Luria, the record shows instructions by the Bethlehem official responsible for scrap policy to his scrap buyer to ". . . write Pappas [a Rheem Manufacturing Company official] that Sp. Pt. [Rheem plant at Sparrows Point, Maryland] will be included in over-all scrap deal with Luria." (Emphasis supplied.)

At one time or another, practically all of the mill respondents have notified other brokers and dealers, Government agencies and scrap producers, such as railroads and factories, that Luria was the mills' exclusive broker. The mill respondents consistently refused to accept offers of scrap from brokers competing with Luria although, in some cases, the turned-down brokers had been significant sup-

pliers. On occasions, the mill respondents notified Luria of offers received from other brokers or referred the offering brokers to Luria. Respondent Bethlehem once turned down an offer of 500 tons of scrap at $42.50 per ton. The day following the offer Luria called the offering broker and agreed to purchase the scrap for $43.50 per ton. The scrap was then shipped to Bethlehem.

The statistical evidence strongly indicates the existence of agreements between Luria and each mill respondent. Luria has been the almost exclusive supplier of mill respondents Lukens Steel Company, Grinnell Corporation, and Standard Steel Works Division of Baldwin-Lima-Hamilton since the 1930's. It is difficult to believe that the almost 100% exclusive dealing practiced by these respondents for such a long period of time is not the result of an agreement or understanding. And with those mill respondents whose substantially exclusive dealing with Luria is of less duration, the evidence shows a sudden supplanting of many former suppliers with the single supplier Luria. Such a massive change in an entire method of doing business would hardly be undertaken without some advance understanding.

The hearing examiner gave lengthy and detailed treatment to this aspect of the proceeding and the Commission endorses and adopts his findings and conclusions with respect thereto as they appear in Section II-B, 1 through 13, of the initial decision. We are also satisfied that he correctly analyzed the applicable legal authorities dealing with this question and see no reason for embellishing his discussion found in Section IV-B-1 of the initial decision. We are satisfied that there exists between Luria and each mill respondent an agreement, understanding, combination and conspiracy pursuant to which Luria supplies each of the mills with all or substantially all of its needs of scrap.

The effect of these arrangements is to exclude competing scrap sellers from a substantial market and thus each of the agreements constiutes an unlawful conspiracy.[19]

We turn now to consideration of the effect which these agreements have had upon the relevant market and the respondents' purpose or intent in executing and performing them.

The Relevant Market

The concept of the relevant market has over-all application to this complaint; that is, it is of equal importance to both the Federal Trade Commission Act and Clayton Act charges. None of the activities allegedly pursued by the respondent are charged in the complaint as unlawful *per se*, and, therefore, each of them must be considered in the light of its probable effect upon the relevant market. As stated above, the relevant market concept breaks down into two principal divisions, that of product and that of area. We first consider the product involved.

The Product Involved

This matter is entirely concerned with iron and steel scrap, generated as a by-product of industry or as a result of the discard of items which have for some reason or other outlived their usefulness. The importance of scrap to the iron and steel producing industry can hardly be overstated. Approximately one-half of every pound of new steel produced in the United States is composed of scrap. The proportion of scrap used in relation to pig iron has been remarkably stable over the years. During the period from

[19] *United States* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131, 160 (1948).

1948 to 1954, the variation range was only 2.5%. This stability of proportionate use is all the more remarkable in view of the fact that the proportionate use by individual mills varies widely from the national norm. Integrated mills, that is, mills with facilities to produce their own pig iron, use a greater percentage of pig iron than non-integrated mills. Mills operating electric furnaces prefer scrap to pig iron since it has less carbon and fewer other impurities. In some electric furnaces the charge consists entirely of scrap.

The respondents contend that pig iron is directly competitive with scrap, and the relevant product market here involved should consist of both products. Respondents argue that, for the most part, the two products are interchangeable and that the Supreme Court in *United States* v. *E. I. duPont de Nemours & Co.*[20] *(the Cellophane Case)* held that reasonably interchangeable products must be considered as a single line of commerce. Complaint counsel admit that pig iron and scrap "are to a large extent substitutable for each other."

The hearing examiner rejected the "reasonable interchangeability" test of *The Cellophane Case,* concluding that "it is now generally accepted that this test is limited to cases arising under the monopolization clause of Section 2 of the Sherman Act and does not apply to cases involving a charge of incipient, rather than actual, restraint or monopoly."[21] The hearing examiner utilizes and relies upon what he and many of the writers believe to be the less stringent test of the *duPont-General Motors* case (*United States* v. *E. I. duPont de Nemours & Co.* [22]). The test as announced

[20] 351 U. S. 377 (1956).
[21] Initial decision at 333.
[22] 353 U. S. 586 (1957).

there is whether the product has "sufficient peculiar characteristics and uses to constitute [it] sufficiently distinct from all other [products]." The hearing examiner then found as a fact that scrap has sufficient peculiar characteristics and uses to constitute it a distinct product from pig iron for the purposes of determining the appropriate line of commerce. He also held that there were sufficient limitations on the interchangeability of the two products to satisfy *The Cellophane Case* rule.

While the hearing examiner did not have the advantage of the Supreme Court's views on this point as set out in its recent opinion in *Brown Shoe Co.* v. *United States,*[23] he nevertheless arrived at the correct ultimate conclusion. In *Brown,* the Court explained that the ". . . outer boundaries of a product market are determined by the reasonable interchangeability . . ." test while within the broad market contained within such "outer boundaries" ". . . well defined submarkets may exist, which in themselves, constitute product markets for anti-trust purposes." Among the criteria or indicia to be considered in drawing the boundaries of such a sub-market are ". . . the product's peculiar characteristics and uses."

Thus the Supreme Court has laid to rest the apparent disharmony between the rules of the *Cellophane* and *duPont-General Motors* cases by the simple and eminently logical expedient of blending one into the other. In addition to the "peculiar characteristics and uses" criteria, the Court opines that "industry or public recognition of the submarket as a separate economic entity, . . . unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors" are to be considered as

[23] 370 U. S. 294 (1962).

important indicia. It is apparent that application of these indicia to this matter clearly establishes the existence of a completely separate market for scrap. As we pointed out above, the demand for scrap has remained constant in relation to the demand for pig iron. This is probably due to the "peculiar characteristics" of scrap as found by the hearing examiner. There is little cross-elasticity of demand between scrap and pig iron. The price of scrap is extremely volatile, while the price of pig iron remains fairly stable. Scrap is produced and marketed in an entirely different fashion and for the most part by an entirely different group of competitors. Thus, as we view it, the practices engaged in by the respondents herein must be measured against a market composed of scrap alone.

The Relevant Geographic Markets

The hearing examiner measured the competitive effects of the various practices engaged in by the respondents in a market composed of the entire Nation and in certain lesser geographical areas as follows:

North Atlantic area

> The six New England States, plus New York, New Jersey, Delaware, Maryland, District of Columbia and eastern Pennsylvania.

Eastern Pennsylvania area

> That part of Pennsylvania located east of McKean, Cameron, Clearfield, Cambria, and Somerset Counties.

Pacific Coast area

California, Oregon and Washington.

Rocky Mountain area

Arizona, Colorado, Utah, Idaho, Montana and Wyoming.

Pittsburgh-Youngstown area

An area extending from Johnstown, Pennsylvania, through Monessen and Washington, Pennsylvania; then northwest through Steubenville, Ohio, Weirton, West Virginia, and Youngstown, Ohio, to Warren, Ohio; then east through Sharon, Pennsylvania, and back to Johnstown through Butler, Pennsylvania.

St. Louis district

The metropolitan area of St. Louis and immediately contiguous areas in Missouri and Illinois.

The hearing examiner found that these "are the basic areas from which the mills draw the bulk of their scrap year in and year out." Respondent Luria disputes the accuracy of this finding and charges that the examiner has, in fact, made contradictory findings. It points out, for example, that the hearing examiner found that certain areas do not produce sufficient scrap to satisfy the consumers located therein, and that as a result, dealers and brokers operating in these areas must reach out into other areas to obtain the additional quantities of scrap required. In the first place, we do not agree that the two findings are contradictory. The evidence clearly shows that steel mills are forced by freight costs to buy as much of their scrap as possible in areas contiguous to the point of consumption. This is true of all mills in all areas. The hearing examiner

agrees that there were, and are, significant movements of scrap across the geographic market lines set out. It is our view that this finding is not inconsistent or incompatible with a finding that the mills draw the bulk of their scrap from the areas defined.

Secondly, we are not convinced of the merit of the proposition that the market to be considered is the entire area from which the mills draw scrap. Respondents contend that the examiner's approach of limiting analysis to consuming areas was rejected outright in *Tampa Electric Co.* v. *Nashville Coal Co.*[24] Assuming the applicability of the *Tampa Electric* case as a precedent here, we cannot agree that it holds that the relevant market must be determined in relation to the sources of the product involved. In *Tampa Electric* the court held that the relevant market consists of the area in which the seller and its competitors "effectively compete."[25] The court adopted the petitioning electric company's definition of the market as the area in which the 700 coal producers operating in the Appalachian coal area ". . . were willing to compete for the consumer potential."[26] As we see it, the court was simply reiterating the established view that the market is a sales area. In effect, all that *Tampa* holds is that the "pie" may not be sliced too thinly, i.e., there must be a demonstrable reason for the market boundaries drawn. The court could find no basis for the selection of "Peninsular Florida" as a separate market area and held it, therefore, an inadequate segment within which to measure the impact of the parties' restrictive contract. In this proceeding, the market lines were drawn to include

---

[24]365 U. S. 320 (1961).
[25]Id. at 332.
[26]Id. at 331.

the areas where most of the principal buyers are located and where the bulk of all scrap is consumed.

Moreover, there is, to our mind, a very significant difference between the factual situation presented in the *Tampa* case and in the instant matter. Here the product does not, like coal, originate in a relatively confined geographic area but springs from every single hamlet, farm and place of human abode in the country. From this myriad number of sources it flows to a relatively confined and limited number of purchasers—the mills and foundries. While the smaller foundries are rather widely scattered throughout the country, the customers taking the bulk of the scrap (from two-thirds to three-quarters of all scrap consumed domestically), that is to say, the huge steel mills, are concentrated within relatively confined geographic areas. And in our view it is this area, that is, the area wherein the purchases are made, that comprises the relevant geographic market. In the *Tampa* case the opposite was true. The product originated in a relatively confined area and was sold to a myriad number of users located throughout the country. The coal producers market was ubiquitous, while the scrap sellers' market is highly concentrated. In its *Tampa* opinion the Supreme Court points out that the states of Florida and Georgia combined purchased only 2,304,000 tons of the 290,567,000 tons of coal sold in 1954 by the 700 coal producers (id. at 332). Thus, the area could not be considered an "appreciable segment" and was, in fact, a relatively insignificant market area. In contrast, here the areas chosen absorb the bulk of all scrap domestically consumed.

In essence, the market and supply picture with respect to scrap is that each individual consumer attempts to buy scrap from sources located in its immediate vicinity. When these sources become inadequate, the search is expanded in

ever widening circles until the needs are supplied. Thus, to a great extent, the boundaries of the relevant geographic market are dependent upon the law of supply and demand. The areas are confined during periods of full supply and expanded during periods of scarcity of scrap. Of course, during both periods the mills tend to purchase the "bulk" of their supplies of scrap within an area of close proximity to the point of consumption. The hearing examiner found that the areas outlined in the initial decision reasonably coincide with the mills' natural and normal purchase areas, and respondent Luria has not convinced us that this finding is in error. Thus, it is our view that the regional markets described above represent areas of effective competition wherein the effect of the activities and practices engaged in by all of the respondents can properly be measured. The drawing of geographic market lines is definitely not an exact science. The most that can be accomplished along these lines is to attempt to define with reasonable accuracy and particularity the principal areas of effective competition. In our opinion this has been done.

The Amount of Commerce Controlled

Luria's position, that is, its share of the total commerce in iron and steel scrap in both the Nation and in four principal regional markets is revealed by the table attached as Appendix A. The data contained in this tabulation are vigorously attacked by respondents, but it is our view that the statistics produced are the best and most accurate which can reasonably be obtained.

Luria principally objects to the failure to include within the tabulation the purchases of some 3,000 scrap consumers

who absorb between one-fourth and one-third of all domestically consumed scrap. The figures in evidence were secured by means of a survey addressed to the 70 principal iron and steel scrap consumers, who together represent approximately 99% of the country's total ingot capacity. The 3,000 scrap consumers not included in the survey are mostly small foundries. Because of their large number and relatively small individual needs it was deemed impractical to survey this entire group. It is Luria's contention that because this group was not surveyed it must be assumed that Luria sold no scrap whatsoever to them. However, this proposed conclusion is directly contradicted by the evidence of record. The hearing examiner concluded, on the basis of reliable evidence, that Luria is a substantial supplier to the nonsurveyed consumers and that their inclusion in the survey would not have produced a significant change in the result.

The tabulation covers only the purchases made by the surveyed mills from brokers and dealers and excludes from the total "universe" the purchases made by the mills directly from scrap producers such as railroads and industrial plants. It is indisputable that the "universe" includes all purchased scrap and not only broker and dealer scrap, but, as the hearing examiner points out, the exclusion of scrap purchased from direct suppliers does not affect the validity of the figures contained in the tabulation. The only effect of including the figures showing scrap purchased from direct suppliers would be to reduce slightly Luria's percentage of the universe.[27]

---

[27]The effect is illustrated by the following table which compares Luria's position in a national market consisting of the total purchases of the reporting mills with its position in a national market composed of the reporting mills' purchases from brokers and dealers:

PURCHASES OF SCRAP BY ALL REPORTING MILLS FROM (a) ALL SOURCES, (b) BROKERS AND DEALERS, AND (c) LURIA AND SUBSIDIARIES, 1947-1954

	(a) Total Purchases	(b) From Brokers & Dealers		(c) From Luria & Subsidiaries	Percentage of:	
	1,000 Gross Tons	1,000 Gross Tons	Percent of Total	1,000 Gross Tons	Total	Broker-Dealer
1947	17,224	15,931	92.5	2,730	15.8	17.1
1948	18,741	17,319	92.4	3,258	17.4	18.8
1949	14,173	12,756	90.0	2,848	20.1	22.3
1950	19,791	18,235	92.1	5,369	27.1	29.5
1951	20,444	18,232	89.2	5,719	28.0	31.4
1952	22,367	20,620	92.2	6,875	30.7	33.3
1953	21,897	19,935	91.0	7,281	33.3	36.5
1954	15,807	14,099	89.2	4,751	30.1	33.7

Respondent Luria objects to the manner in which the purchases of two of the respondent mills, United States Steel and Bucyrus-Erie, are presented in the tabulation. While each of these mill respondents operate more than one scrap consuming facility, the tabulation includes within the respondents' purchases category the figures for only the one United States Steel plant located at Geneva, Utah, and the single Bucyrus-Erie plant located at Erie, Pennsylvania. The balance of the scrap purchase made by these respondents at all of their other plants is included in the figure showing purchases by nonrespondent mills. The reason for this division is reasonable and logical. Luria dealt with these two respondents on a plant-by-plant basis and with the other respondents on a company-wide basis. The complaint charges that United States Steel and Bucyrus-Erie are involved in this proceeding "especially because" Luria is the exclusive or substantially exclusive supplier to their single plants as named. The tabulation is, therefore, in complete harmony with the complaint and the facts as they exist.

It will be noted that Appendix A compares Luria's position as a supplier to the respondent mills with its position as a supplier to nonrespondent mills. This comparison points up the part which Luria's dealings with the respondent mills played in securing for Luria its relative position in the market surveyed.

The remarkable rise in Luria's position in the national market is graphically illustrated in Appendix A. During the eight-year period covered by the tabulation, Luria's percentage of the total scrap sales by all brokers and dealers in the United States rose from 17.1% to 33.7%. That this was due, for the most part, to the arrangements with the mill respondents is indicated by the fact that Luria's share of their purchases totaled only 35.9% in 1947 and rose to 78.5% in 1954. Luria's position with all surveyed nonrespondent consumers showed an increase of only approximately 7%, from 9% to 15.8%.

The substantial impact of the combined activities of Luria and the mill respondents is even more marked in the various regional markets covered by the tabulation. In the Pacific Coast area, Luria's percentage of the market increased from .2% in 1947 to 50.6% in 1954. This was due to the fact that Luria was, by 1954, supplying 80.4% of the mill respondents' scrap needs in that area. The other regional markets present a similar picture. In the North Atlantic market, Luria, by 1954, had amassed to itself 74.5% of the total broker and dealer scrap sales. This represented an increase of more than 100% over its market share in 1947 of 34.1%. That this was due to the deals with the respondent mills is shown by the fact that Luria's share of the purchases of nonrespondents remained substantially the same over this period while its share of the purchases made by respondents increased from 36.5% to 87.1%.

Opinion of the Commission (November 15, 1962)

In 1954, Luria was supplying 83.3% of the scrap consumed by the reporting mills in eastern Pennsylvania. This represented an increase over 1947 of almost 100% and was accounted for, in the main, by the fact that Luria's share of the respondent mills' purchases increased from its 1947 figure of 50.1% to 89%.

Luria's position in the Rocky Mountain area did not show any improvement over the period from 1947 to 1954, for the simple reason that it had a virtual monopoly in this area during the entire period. Its smallest share of this market was 87.2% realized in 1951. In 1947 and 1954, Luria's share reached the startling figure of approximately 99%.

A market not covered by Appendix A is the so-called St. Louis district. This market area contains only two large scrap consumers, the respondent Granite City and the Laclede Steel company. Next in size are three large open hearth steel foundries, American Steel Foundries, Scullin Steel Company, and General Steel Castings Corporation. The hearing examiner found that there were, in addition, some 40 to 50 scrap consumers in the area but that all of them together accounted for less than 20% of the broker-dealer scrap purchased. Respondent states that there are no statistics in the record to support this 20% figure. While the 20% figure is admittedly an estimate, we believe it to be founded upon sufficient facts to satisfy the substantial evidence requirement. This evidence includes the testimony and sales statistics of five of the largest brokers located in this market and the purchase figures of the largest foundries.

It is important and significant that the ingot producers, Granite City and Laclede, constitute the only market in this area for certain grades of scrap such as No. 2 bundles.

Opinion of the Commission (November 15, 1962)

It is the Commission's view, and we so find, that the tabulation below, taken from the hearing examiner's initial decision, adequately and validly portrays Luria's position in the St. Louis district or market. Since the primary purpose of this tabulation is to depict the part played by the full-supply arrangement between respondents Granite City and Luria, the purchases of Granite City are depicted separately.

SCRAP PURCHASES FROM BROKERS AND DEALERS BY FIVE MAJOR CONSUMERS

	St. Louis District					
	1949-1954					
	1949	1950	1951	1952	1953	1954
Total All Companies	603,716	909,178	920,549	889,268	796,188	630,272
% from Luria	16.5	31.0	51.7	42.5	51.6	45.4
Total Granite City	261,895	407,054	408,754	349,119	397,771	274,640
% from Luria	0.3	59.5	100.0	100.0	100.0	100.0
Total non-respondents	341,821	502,124	511,795	540,149	398,417	355,632
% from Luria	28.7	7.9	11.1	5.4	3.3	3.1

The tabulation reveals that Luria increased its position in the St. Louis market during the period 1949 to 1954 from 16.5% of the the broker-dealer scrap purchased by the five largest consumers to 51% in 1951 and 1953, declining to 45.4% in 1954. Here again the increase in Luria's share of the market was achieved entirely as a result of its exclusive arrangement with respondent Granite City.

The described statistical evidence reveals that Luria has achieved a monopolistic or near monopolistic position in several important scrap markets. In the national market and in the regional markets where it is dominant but not yet in control, the record shows a rapid increase in Luria's

market share leading to the conclusion that monopoly or near monopoly may be in the offing. All in all the picture is not one of competitive health and vigor but one of market foreclosure and monopoly. We must now determine whether the condition was purposely effected, i.e., did the respondents act with intent?

The Respondents' Purpose

It is our conclusion that the hearing examiner erred in not finding that the respondents together possess monopoly power over the scrap market. The most concrete example of this is found in the Rocky Mountain area where the only significant consumers appointed Luria as their exclusive supplier. All dealers in this market must sell to Luria and on such terms as Luria sees fit to impose. Luria may refuse to purchase from particular dealers and thereby cause their demise since scrap cannot be economically shipped long distances to other markets.

In all the other markets, and in the Nation as a whole, it would appear that the inevitable consequence of a continuation and extension of these full supply agreements would be to grant Luria monopoly power. Respondents argue that Luria can never achieve absolute monopoly power since its position is maintained at the mill respondents' sufferance. They point out that at any time they can terminate their arrangement with Luria, thereby rendering it powerless. While this may be true, it does not render Luria as a monopolist or potential monopolist more legally palatable. The record clearly shows that these full supply arrangements give Luria absolute power over all of the brokers and dealers who desire to or, in some instances, must, as an economic necessity, sell to the mill respondents.

Luria has the power to control the prices which such brokers and dealers will receive for their scrap and has the power to exclude such competitors from the market which the mill respondents constitute. While this monopoly power may exist, as the mill respondents contend, at their sufferance, it is nonetheless monopoly power and unlawful.

It is unimportant that this power may never be used to actually control prices for it is unlawful *per se* when deliberately attained.[28] And since monopoly power was the necessary consequence or result of the full supply agreements, it must be found that the respondents purposefully and deliberately created it.[29]

Several of the respondents admit that they deal with Luria exclusively, or nearly so, to prevent competition among brokers buying scrap for them. They argue that if several different brokers are attempting to obtain scrap to supply their needs, the brokers will bid against each other and thereby drive up the price of scrap. We fail to see how this argument aids respondents. In the first place, scrap brokers are not agents sent forth by the mill to buy scrap at whatever price they are able to negotiate with dealers or other suppliers. Scrap brokers are wholesalers who sell scrap to the mills at a price agreed upon when an order is placed. When a broker accepts an order he may already have the scrap on hand or he may have to secure it in the market at the best price he can obtain, but, in either case, the price to the mill is fixed at the time the order is placed. The broker, not the mill, takes the risk of a subsequent market price rise. As the initial decision points out at

---

[28]E.g., *American Tobacco Co.* v. *United States*, 328 U. S. 781, 810 (1946).

[29]*United States* v. *Griffith*, 334 U. S. 100, 108 (1948).

I-B-16: "Because of market fluctuations and varying competitive conditions in various markets, the buying and selling of scrap by brokers is largely a speculative operation."

Moreover, if respondents' premise that dealing with a multiple number of brokers enhances prices had merit, we would expect that all significant consumers would be buying from only one broker. But this record reveals that many of the large steel mills are content to deal with several brokers, and one, Youngstown Sheet & Tube Company, does so "primarily" in order to be assured that it is getting the best price. It seems to us that the practice of requesting competing bids from competing brokers is more likely to produce lower prices than granting an exclusive deal to a single broker

However, the practice of dealing with a single broker can very definitely have an effect upon prices if all of the significant consumers in the market, unilaterally or otherwise, decide to deal exclusively with the same broker. The danger here is clear, for the broker then would have absolute control over the prices paid to dealers and other suppliers since he represents the only entree to the consuming mills. And in a very real sense, that is what this case is about. In several markets Luria has acquired, or is well on the road to acquiring, monopoly power over the scrap industry. The source of this power is the mill respondents, and the vehicle used to bring it into being is the exclusive supply arrangements. It is of no consequence that the record does not establish that the exclusive use of Luria is the product of an agreement among the respondent mills for we are concerned here with effects rather than means. The effect of the exclusive arrangements here existing is, and has been, to exclude competing brokers from substan-

tial markets, to grant monopoly power to Luria and to create a monopoly in Luria.

Viewed as attempts to stabilize prices for scrap and to eliminate competition, the agreements between Luria and the mill respondents constitute unreasonable restraints on trade, which would violate Section 1 of the Sherman Act. And it is our view that they likewise are conspiracies to monopolize within the meaning of Section 2 of the Sherman Act.

In addition to the statistical evidence of market foreclosure, there is much additional specific evidence of the adverse competitive effects of these exclusive supply arrangements. Dealers and brokers who were formerly substantial suppliers to the mill respondents saw their sales to this market diminish to insignificance. While on occasion the mill respondents continued to purchase from these former suppliers, they placed them under severe limitations as to the points from which scrap could be shipped and on occasion required them to sell at prices as much as a dollar less per ton than the prices the same mill respondents were affording to Luria. These discriminatory practices are likewise unlawful restraints of the type condemned by the Sherman Act.[30]

In our deliberations on this complaint, we have given weight to the substantial disparity in size and strength between Luria and its broker and dealer competitors.[31] Luria is the only broker-dealer doing a substantially national business. All of the other brokers and dealers confine their operations to one or two of the regional markets and

---

[30] *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 182-183 (1944).

[31] *United States* v. *Griffith*, 334 U. S. 100, 107 (1948).

must of necessity operate profitably in that market or markets or perish.

Thus, it is our conclusion that this record demonstrates quite conclusively that the respondents have attempted to monopolize and have, in fact, monopolized significant parts of commerce and that, unless deterred, will eventually produce in respondent Luria a complete monopoly in most of the major markets for iron and steel scrap.

The Exclusivity Order

We have made extensive changes in Paragraph 1 of the order proposed by the hearing examiner. In the first place, we do not feel that the record will support an order of this type against respondent Southwest Steel Corporation. Standing alone, separated from Luria by an order of divestiture, Southwest is not a dominant factor in any market and the probable effects of an exclusive agreement between it and a mill or mills have not been explored.

We have also redrafted the prohibitions of the order to shift the emphasis from the conspiratorial aspects of the exclusive agreements to the acts or practices engaged in pursuant to the agreements. It seemed to us that the hearing examiner's order prohibited the mills and Luria from dealing exclusively pursuant to an agreement or conspiracy. Such an order may be interpreted as permitting a continuation of the exclusive dealing between the parties sans agreement. Such an order would be a hollow shell devoid of effect upon the practices found to be injurious to competition.

A principal objection raised by the mill respondents to the hearing examiner's order and one which applies equally to the order as redrafted by us is that it would prohibit a mill from purchasing "substantially all" of its scrap from Luria even though no other supplier was available. Cer-

tainly we do not intend any such harsh result and in the unlikely event that the prospects of hardship of this type should arise we will not hesitate to grant hasty relief upon a showing properly made.

In subparagraph (c) of Paragraph 1 of his order, the hearing examiner directs all of the larger mill respondents[32] to refrain from making all or substantially all of their scrap purchases from any broker or supplier not a party to this proceeding. We find ourselves in agreement with the mill respondents' contention that there is no record evidence to support a prohibition of this type. From this record there is no way to anticipate what the probable effect of a full supply contract between any plant belonging to these respondents and any other unknown broker or supplier may be. The full supply arrangements between Luria and the mill respondents are unlawful because of their dangerous tendency and because of the fact that they have, to a certain extent, created a monopoly in Luria. Full supply arrangements are not unlawful *per se,* but only insofar as they restrain, or have the tendency to restrain, competition. Whether a full supply agreement between the plants of these respondents and another broker or supplier of scrap unknown to us may have these effects must await another proceeding brought specifically to examine such an arrangement. In conformity with these views, we are striking subparagraph (c) of paragraph 1 of the hearing examiner's order in its entirety.

All the respondents reserve their heaviest attack for the prohibitions contained in paragraph 2 of the hearing

---

[32]Respondent Edgewater Steel Company, Columbia Malleable Castings Corporation, Bucyrus-Erie Company, Baldwin-Lima-Hamilton Corporation, Detroit Steel Corporation, and McLouth Steel Corporation are exempted from this prohibition because of their relatively small scrap purchases.

examiner's order. This paragraph of the order is directed against all of the respondent mills and prohibts them from purchasing in excess of 50% of their requirements of scrap from respondent Luria for the next five years except to the extent that other suppliers have failed to offer or deliver scrap in sufficient quantities. That this is a novel prohibition in Federal Trade Commission orders cannot be denied, but its newness does not militate against its acceptance. Since the term "unfair trade practices" was left without exact definition in the Federal Trade Commission Act, so that the Commission would be empowered to deal with each new device or practice which competitors could devise, it would seem that new orders specially drafted to fit each new factual complex are to be desired rather than avoided.

We reject respondents' contention that this paragraph of the order is beyond the Commission's power to promulgate since it requires affirmative conduct. Any prohibition of specified conduct usually requires as its necessary counterpart that the respondent take affirmative action of a type not prohibited by the order. Moreover, even when viewed as requiring affirmative action, the Commission's power in this respect is clear.[33]

Respondents next argue that the order is arbitrary. They point out that the competitive patterns differ widely from market to market and that, therefore, this "blanket order" is not related to the practices in any particular market area. The respondents ask, "What are the basic facts

---

[33]E.g., *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 430 (1957); *Bantam Books, Inc.* v. *Federal Trade Commission*, 275 F. 2d 680 (2nd Cir. 1960), *cert. denied* 364 U. S. 819 (1960).

which led the Hearing Examiner to choose 50% for 5 years? Why not 30% for 2 years, or 10% for 1 year?"

It was apparent that the intendment of the hearing examiner was to restore to the area of free competition a reasonable segment of the market now foreclosed by these unlawful arangements. His order is based upon his observation of this industry over a period of several years. The order is not unduly harsh since Luria is permitted to retain up to 50% of the volume of any plant. By freeing the remaining 50% to Luria's competitors, the hearing examiner intended to provide a "breathing spell" of five years, during which competition could be restored. Since the mill respondents are ordered to buy from suppliers other than Luria only when such other suppliers offer scrap, adequate in quantity and quality, on terms substantially similar to those offered by Luria, they are not subjected to an economic penalty, nor need they ever be in a short supply situation.

We see very little substance to the argument that compliance with the provision is impossible because scrap needs vary from month to month and a mill cannot determine in advance its total annual needs. Future scrap needs are susceptible of reasonably accurate predictions and all that is required here is for the respondents to exercise good faith in making their estimate.

It is our opinion, and we find, that the basic prohibition of paragraph 2 of the order promulgated by the hearing examiner is reasonable under the circumstances and is responsive to the factual situation found. We endorse and adopt the views of the hearing examiner expressed at page 352 of the initial decision:

> "In the opinion of the examiner the momentum of the exclusive arrangements between Luria and

the mills, which have been here found to be illegal, will continue to plague the industry and yield benefits to Luria, unless some remedy more drastic than that proposed by counsel supporting the complaint is adopted. What is required here is a provision which will induce the mills to place orders with other suppliers who submit offers comparable to Luria's. Merely prohibiting the mills from agreeing with Luria to use it as exclusive or preferential broker, or from agreeing to purchase all of their scrap from Luria will not accomplish this. By using one additional broker for a minor portion of their requirements the mills may find an avenue for the successful evasion of the order. Aside from any conscious effort to evade the order, there is a strong likelihood that they will continue to favor Luria because of their confidence in it, born of the former illegal relationship. The only way to assure that Luria will not continue to benefit from its illegal exclusive arrangements, and to encourage the re-establishment of normal competitive conditions in the industry, is to prohibit the mills for a period of time from refusing to place orders for at least half of their purchased scrap requirements with other suppliers who submit offers comparable to those received from Luria, and from purchasing more than half of their scrap from Luria where comparable offers have been received from others."

In an effort to simplify and clarify this part of the hearing examiner's order, we have made extensive modifications therein. We have replaced his subparagraphs (a) and (b) with a single paragraph (a). We have also corrected what would appear to have been an inadvertent error. The hear-

ing examiner's order as drafted would have required each mill respondent to place 50% of its annual requirements with suppliers other than Luria. Thus, the order would have been inoperative with respect to such mill respondents as United States Steel since more than 50% of its total corporate requirements are satisfied by other suppliers. As modified by us, the order now requires that 50% of each plant's requirements be placed with suppliers other than Luria.

The Export Trade Agreements

In Paragraph Twelve of the complaint, it is charged that Luria entered agreements and conspiracies with respondent Hugo Neu Corporation and other unnamed parties for the purpose and with the effect of restraining competition "in interstate and foreign commerce, and tending to create a monopoly in said respondents in the sale of iron and steel scrap from the continental United States to customers located in other countries." The complaint then specifies in some detail an alleged agreement between respondent Neu and five of the leading steel producing companies of Japan, pursuant to which Neu was to act as their exclusive supplier for scrap exported from the United States. The complaint charges that Luria became a party to this agreement by means of a second agreement negotiated between it and Neu, pursuant to which Luria would supply part of the iron and steel scrap to be shipped to the Japanese combination.

While this arrangement with the Japanese mills is the only specific conspiracy with respect to export operations charged in the complaint, the examiner received a good deal of additional evidence pertaining to alleged conspiracies or

unlawful practices engaged in by Luria with respect to export shipment to various European countries and Argentina. This additional evidence, however, did not involve respondent Neu. The evidence with respect to the other alleged unlawful activity was admitted under the theory that the complaint specified the Japanese conspiracy only as an example or illustration of a broad charge of combination and agreement involving of exporting of scrap.

The hearing examiner found that the charge of unlawful conspiracy growing out of the arrangement with the Japanese mills had not been sustained. We are in complete agreement with this conclusion. The facts of this situation are relatively simple. In July of 1953, respondent Hugo Neu Corporation entered a contract with a cooperative group of Japanese mills which called for the delivery of a maximum of 150,000 tons of steel scrap. The shipment was to be completed within six months after the lifting of United States export controls. The export restrictions were relaxed in October of 1953, and the full 150,000 tons of scrap was delivered during the next six months.

Luria came into the picture when Neu was unable to obtain the necessary scrap to fulfill its contract. In November 1953, Neu entered into an oral agreement whereby Luria undertook to supply scrap to Neu at Luria's cost for transshipment to the Japanese mills. In return Luria was to receive a portion of the profit of the resale to the Japanese. Of the 150,000 tons supplied to the Japanese under contract, 90,000 were actually obtained from Luria. After Neu's contract with the Japanese had been satisfied, the arrangement between Luria and Neu terminated.

In dismissing the complaint as to the respondent Neu, the hearing examiner pointed out that the record contained no definitive evidence as to Neu's position or strength in the

scrap industry. He reasoned that the fact that Neu was unable to fulfill a contract for 150,000 tons of scrap without calling on Luria showed that it was not a dominant or major factor.

Insofar as Luria is concerned, he concluded that it participated in the arrangement between Neu and the Japanese mills as merely another supplier, albeit a large one. It was not a party to the original agreement, and Neu did not enter the agreement with the Japanese mills in the expectation that Luria would become a party. Thus, he concluded that Luria's participation in this arrangement was not unlawful.

It is the Commission's viewpoint that arrangements of the type here described may constitute unlawful restraints on trade if greater shares of commerce are involved and the contract persists for a more extended period. The evidence here clearly shows that the contract in question was never renewed nor was any similar contract ever executed. The contract had a relatively short life, and there is no present likelihood that it will be reinstated. Under these circumstances, there is no reason or justification for an order against respondent Neu, and we affirm its dismissal from this proceeding.

The respondent Luria, however, was ordered by the hearing examiner to cease and desist from singly or in combination with others entering any agreements or combinations with foreign steel consumers pursuant to which Luria acts as the exclusive or substantially exclusive broker or supplier of scrap exported from the United States. This order of the hearing examiner is not founded upon Luria's activities with respect to the Japanese mills, but is based in its entirety upon certain agreements entered with a group of European steel mills.

Opinion of the Commission (November 15, 1962)

In the early 1950's, the countries of West Germany, France, Italy, Belgium, the Netherlands, and Luxembourg, as a part of the common market or Schuman Plan, formed the European Coal and Steel Community. This cooperative authority was given power and supervision over the coal and steel industries of these countries. A central buying office was formed to purchase the scrap needed by the mills of the various countries. The central buying office, named Office Commun des Consummateurs de Ferraile, is commonly referred to by its initials OCCF.

In early 1954, OCCF invited three American scrap companies to its office in Brussels to discuss arrangements for its purchase of United States scrap. Each of the three American scrap companies was desirous of acquiring the exclusive right to supply OCCF. That Luria was so motivated is evidenced by the testimony of its vice-president, Ralph Ablon, who arranged a separate conference with an OCCF official "to see if there wasn't some way whereby I could get all the business". However, instead of appointing one of the three applicants, OCCF advised them that all three had been selected.

Sometime later, OCCF presented to the three companies a draft of a contract which it had prepared. The contract placed upon the three suppliers the joint obligation to supply OCCF's scrap needs from scrap obtained in the United States, Panama, Cuba, Puerto Rico, Aruba, Curacao, and Trinidad. This contract was signed by the representatives of the three companies on May 4, 1954, but was not approved by OCCS until July 14, 1954. The contract called for the shipment of an indefinite amount of scrap to OCCF in a range between 15,000 and 250,000 tons. The price was fixed at the lower of cost or the *Iron Age*[34]

[34]A trade publication which lists the prices paid for scrap by mills in the various markets.

composite price, plus shipping expense, plus $2.00 per ton commission. While the facts are not absolutely clear, it would appear that the contract was primarily awarded to Luria and that Schiavone-Bonomo Corporation had been included in the group at the insistence of the Italian mills, and Western Steel International Corporation had been included at the instance of the German mills.

The three companies agreed to share equally in the venture. Western was to be responsible for the administration of all details abroad and Schiavone-Bonomo and Luria were responsible for the purchase and shipment of the scrap. This exclusive contract was operative through the year 1954 and was extended for two three-month periods and a six-month period to the end of 1955.

Almost before it became operative, the contract was, at Luria's request, amended in certain important particulars. The original contract called for the shipment of only No. 1 and No. 2 Heavy Melting Steel. It was modified to the extent that the Luria group was permitted to ship No. 2 Bundles to the extent of one-third of each cargo. The price formula was altered so that the ultimate price was based entirely on cost rather than the lower of costs or the *Iron Age* listed price. In addition, Canada was included within the area covered by the contract.

The total shipments under the contract far exceeded the maximum limit of 250,000 tons specified. During the year 1954, shipments by the Luria group totaled 543,000 tons. This amount was equal to 90.4% of the total amount of scrap shipped from the United States to OCCF countries in 1954. During the year 1955, the Luria group shipped 1,970,000 tons to the OCCF countries, which was equal to 95.3% of the total United States shipment to those countries.

Opinion of the Commission (November 15, 1962)

At the end of 1955, for reasons which are not entirely clear, the OCCF advised Luria that the existing exclusive contract could not any longer be extended. However, there is documentary and other evidence to indicate that despite the absence of a binding contract it was OCCF's intention to continue to favor the Luria group with the majority of its United States purchases. The record contains no record of 1956 scrap shipments by the Luria group to OCCF beyond April. During that four-month period, the Luria group shipped 638,000 tons, or 82.1% of the total United States scrap shipped to the OCCF countries. In October 1956, OCCF entered another contract with Luria which specfied that OCCF reserved the right to place orders with other suppliers. While the contract was entered with Luria alone, it was understood that the other two members of the group would participate in its performance on an equal basis. The record does not disclose the amount of scrap shipped pursuant to this contract.

The original OCCF contract contributed in a large measure to Luria's dominant position in the market consisting of that portion of the scrap needs of foreign consumers which is satisfied by United States exports. Complete satistics are available for only the years 1954 and 1955.

In 1954, a total of 1,487, 440 gross tons of scrap were exported from the United States. Of this total, Luria was responsible for 751,813 tons, or 50.5%. Luria's shipments equalled approximately 70% of the total United States shipments to the countries to which Luria shipped.

In 1955, United States exports of scrap totaled 4,566,346 tons. Luria was responsible for 2,150,217 tons, or 47.1% of the United States total. Its percentage of the total shipped to the countries with which it did business was approximately 55%.

Opinion of the Commission (November 15, 1962)

As the hearing examiner pointed out, there can be no question but that the effect of the aforesaid exclusive dealing contract was to give the Luria group a monopoly on substantially all scrap exports to the OCCF countries from the United States and other areas in the Western Hemisphere. It seems equally clear to us that the purpose and intent of the contract was to grant such monopoly power and to take advantage of the near monopoly power Luria had in the purchase of scrap in the Eastern United States by reason of its exclusive arrangement with the respondent mills and others. Luria, and Luria alone, had sufficient market power to purchase the amounts of scrap needed by OCCF in the Eastern United States' market without causing a market price increase. In a report to OCCF urging the extension of the exclusive dealing contract, the Luria group advised:

> "An important aspect of the O. C. C. F. method of buying is our purchasing for you in a manner calculated not to disturb the American mills' supply. We are certain that it is unnecessary to point out how quickly this situation would change, both in relation to price and effect on American supply, were there many buyers competing for the same scrap instead of our group."

At a later point, this report boasts that the group's method of buying has been instrumental in lowering the price of scrap in spite of increased demand. It states:

> "We must also point out that, largely due to these accumulations, [large inventories maintained at ports] the composite price has dropped approx. 2 dollars within the past months despite increased

American scrap consumption and increased foreign buying."

The report advised that such good results could not be expected in the future unless the group could operate "without the interference of other buyers for O. C. C. F."

While the hearing examiner found on the basis of the testimony of Luria's vice president that each of the three American exporters shared more or less equally in the effort and profit of the venture, there is evidence to indicate that Luria was the dominant party. For example, the group recommended to OCCF that in the future, cargo allocations be split 50% to Luria Brothers, 25% to Western Steel International Corporation and 25% to Schiavone-Bonomo Corporation.

Luria argues that the appointment of the Luria group as the exclusive supplier to OCCF was entirely the decision of OCCF, and that it had made a decision to select 2, 3, or 4 brokers before Luria was ever contacted. While the evidence on this point is, in our opinion, equivocal, we accept respondents' contentions as facts since complaint counsel does not contest them. But as we view it, these facts are not controlling. No matter how the restraining agreement originally came into being, evidence clearly shows that respondent Luria eagerly embraced it and, moreover, did everything in its power to assure the continuation and extension of the exclusive dealing provision. One is not absolved of complicity in a contract which restrains trade simply because he did not originate the idea. This agreement had the effect of excluding competing United States scrap suppliers from an appreciable market. It is this effect which makes the contract unlawful. Moreover, the restrictive agreement cannot be divorced from Luria's other activities in the dom-

estic scrap market. The agreement and the subsequent attempts to have it renewed and extended constitute clear evidence of an attempt to monopolize a significant part of commerce.

The hearing examiner's order dealing with this violation is appropriate and we adopt it without change.

The Acquisitions of Other Companies

Paragraph Eleven of Count I of the complaint charges, *inter alia,* that Luria violated Section 5 of the Federal Trade Commission Act by acquiring all or a substantial part of the capital stock of certain scrap broker or dealer corporations "for the purpose and with the effect of thereby lessening or eliminating, suppressing, and preventing competition with said respondent by such dealers and brokers in the buying and selling of iron and steel scrap, of lessening and suppressing competition generally in the buying and selling of iron and steel scrap, and of creating and maintaining a monopoly in said respondent." Count II of the complaint charges the same acquisitions constitute violations of Section 7 of the Clayton Act.[35]

While the two charges are founded upon what are basically identical facts, the charges are distinguishable. Under the Section 5 charge, it must be shown that Luria's purpose in making the acquisitions was to injure competition or create a monopoly. Thus this charge is, in effect, a charge

[35] With the exception of an abandoned charge dealing with the alleged acquisition of a stock interest in Apex Steel and Supply Company, the questioned acquisitions were all made prior to December 29, 1950, the effective date of the Clayton Act amendment which forbids the purchase of the "assets" of corporations where the effect may be deleterious to competition (64 Stat. 1125). Thus we are here only concerned with the Act as originally approved on October 15, 1914 (38 Stat. 731).

of attempted monopolization. Under the Section 7 count, it must be shown that the effect of the acquisitions may be to injure competition or to create a tendency toward monopoly without regard for Luria's purpose. Complaint counsel proposed to the hearing examiner a two-part order which would have (1) required Luria to divest itself of its entire interest in five acquired companies, and (2) enjoined it from acquiring any future control in any company engaged in the business of buying and selling iron and steel scrap as a broker or dealer.

The hearing examiner found that only two of the acquisitions, Pueblo Compressed Steel Corporation and Southwest Steel Corporation, were made in violation of Section 7 of the Clayton Act and ordered Luria to divest itself of the stock of these corporations. He dismissed the Section 5 charge as unproven.

The complaint charges that Luria acquired all, or a substantial part, of the capital stock of six corporations which were allegedly engaged as brokers or dealers in scrap. Four of the acquisitions were found to be not lawful, and the hearing examiner's order would permit their retention. Complaint counsel have appealed the hearing examiner's refusal to order divestiture of three of the companies acquired, A. M. Wood & Company, Lipsett, Inc., and Lipsett Steel Products, Inc. We first consider this appeal.

The Acquisition of A. M. Wood & Company

The A. M. Wood Company was a small, family-owned scrap brokerage corporation operating in the eastern Pennsylvania market, with its office in Philadelphia, Pennsylvania. It was acquired by Luria in 1947. A. M. Wood's sales in the eastern Pennsylvania market in 1947 represented less than 1% of the scrap purchased by the steel

mills and major foundries in that market. Its total sales in 1947 equalled only 12,745 gross tons.

Luria continued to operate A. M. Wood as a separate brokerage concern after the acquisition and made no public announcement of its ownership. Thus, some dealers were unaware of the fact that Wood was owned by Luria, but there is no evidence that Luria secured an unfair advantage because of its unpublicized control.

The hearing examiner found that Luria and Wood had not been in "substantial competition" prior to the acquisition; that Wood was of "minuscule size" and in a "moribund state" at the time of acquisition and concluded that the acquisition did not have the requisite injurious tendency. The Commission is in full agreement with these findings and conclusion and the appeal of complaint counsel must, therefore, be denied.

The Acquisition of the Lipsett Companies

On May 4, 1948, Luria acquired all of the outstanding stock of Lipsett, Inc., and Lipsett Steel Products, Inc. There is no record evidence to indicate that either of these companies were, prior to the acquisition, engaged as scrap brokers or dealers, as alleged in the complaint. As a matter of fact, the record is not clear as to just exactly what business they were engaged in. It would appear that Lipsett Steel Products, Inc., was nothing but a corporate shell at the time of acquisition since it had been organized for only about five months. The record indicates that Lipsett, Inc., was engaged to an unknown extent in demolition and construction work and that as a part of its demolition business, it generated scrap of which some was sold to Luria. The record is silent, however, as to the extent of such scrap sales or as to the acquired companies' standing in any rele-

vant market. Lipsett, Inc., continued to operate after the acquisition in the demolition and construction business.

After the acquisitions, Luria operated Lipsett Steel Products, Inc., as a scrap dealer. A scrap yard was acquired in Brooklyn, New York, in 1950, and another in Los Angeles in 1951. After 1950, Lipsett Steel Products, Inc., became a substantial scrapyard dealer, but it appears that its success was primarily due to the efforts of Luria and was not the result of any special intrinsic qualities it possessed at the time of acquisition. In the words of the hearing examiner:

> "So far as appears from the record, Luria could just as well have established additional yards in its own name or in that of a newly-formed subsidiary. The fact that it did so in the name of Lipsett Steel does not provide a basis for retroactively imputing adverse competitive implications to the initial acquisition. . . ."[36]

Complaint counsel do not seriously dispute the foregoing factual findings and conclusions. They admit the record "does not contain pre-acquisition statistics" and does not indicate "the extent of its business activities before it was acqured by Luria"; or "what business it was engaged in up to 1950"; and that with respect to the relevant market, the record shows only "The Lipsett companies were located in New York City and presumably operated essentially in that market." Certainly this is an inadequate basis for a requested order of divestiture. The hearing examiner's conclusion that Luria's acquisition of these corporations did not violate Section 7 of the Clayton Act is correct and must be affirmed.

---

[36]Initial decision, at 255.

Opinion of the Commission (November 15, 1962)

The hearing examiner found that two of the acquisitions made by Luria violated Section 7 of the Clayton Act, and he issued an order requiring divestiture. We consider now Luria's appeal of this finding and order.

The Acquisition of Pueblo Compressed Steel Corporation

Pueblo Compressed Steel Corporation was incorporated in the State of Colorado on August 3, 1942, and since that time has been engaged as a scrap dealer. Its only yard is located in Pueblo, Colorado, where it is convenient to the Pueblo plant of Colorado Fuel & Iron Corporation (CF&I).

During the same month in which it was incorporated, Pueblo Compressed Steel Corporation entered into an agreement with CF&I, pursuant to which CF&I agreed to purchase all of the scrap offered to it by Pueblo, including all bundled scrap compressed or baled in the Pueblo yard, and to refrain from purchasing from others bundled scrap which had been converted at any place within a radius within 200 miles in all directions from Pueblo. The agreement went into effect in October 1942, and was to continue for a period of five years.

In the spring of 1946, Luria and CF&I entered an agreement pursuant to which Luria was to act as the exclusive broker for CF&I plant at Pueblo. Shortly after this exclusive arrangement was announced to the trade, Luria, through an intermediary, acquired 50% of the outstanding shares of Pueblo. This first acquisition was made July 3, 1946. Approximately a year later, on August 31, 1947, it acquired an additional five shares, giving it the controlling interest. The balance of the outstanding Pueblo stock was acquired ten years later on May 21, 1957.

The hearing examiner found that Luria's purpose in acquiring control of Pueblo was to resolve the conflict be-

tween its exclusive brokerage arrangement with CF&I and the above-described supply agreement between Pueblo and CF&I. After the acquisition, Pueblo sold most of its scrap to Luria, who in turn sold it to CF&I.

Prior to entering into the contract with Pueblo in 1942, CF&I had been buying most of its scrap from direct scrap producers such as railroads. In 1945, it purchased only 53,000 tons from dealers and brokers. Pueblo supplied approximately 11% of this total. In 1945, Luria had not yet entered the Rocky Mountain area.

In 1946, the year of Luria's acquisition, Pueblo processed 27,782 gross tons of scrap, which was equal to 8% of the total purchased scrap consumed in Colorado. This market is characterized by many small scrap suppliers and dealers. The volume of even the larger dealers is generally under $100,000.00 per year. Pueblo, at the time of acquisition, was one of the largest dealers with total sales in 1946 of $379,621.00. In the succeeding two years after the acquisition, 1947 and 1948, the sales volume increased to $858,826.00 and $1,201,663.00, respectively. These sales figures placed Pueblo far in the lead of all other dealer-competitors. Thus, it would appear that Luria's acquisition of Pueblo achieved the elimination of a sizeable competitor and materially augmented its competitive position and ability to dominate the scrap industry in the Rocky Mountain area. The acquisition's effect, therefore, "may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

While the hearing examiner found, and we are in agreement, that the acquisition does have the requisite competi-

tive effects prescribed by Section 7, the order of divestiture cannot stand, for the record fails to support the mandatory finding that Pueblo was, at the time of the acquisition, engaged in commerce. The initial decision does not disclose the facts upon which the conclusion of commerce is based. Complaint counsel's answering brief relies entirely on the fact that CF&I had agreed to refrain from buying bundled scrap converted within 200 miles of Pueblo, and that area included states other than Colorado. Respondent, however, argues with telling effect that, although this radius does include other states, there is absolutely no evidence that Pueblo ever made any purchases in states other than Colorado. As a matter of fact, there is some evidence that Pueblo did not operate in its full 200-mile allotted territory. Further, it is incorrect to characterize the contract between Pueblo and CF&I as giving Pueblo the right to buy scrap for CF&I in a 200-mile area. CF&I merely agreed to refrain from buying bundled scrap which had been processed within 200 miles of Pueblo. Thus, the agreement need not be construed as allotting a buying area to Pueblo, and lacking some record showing as to how the contract operated, we cannot assume that Pueblo extended its operations to the full periphery of this 200-mile area.

While the failure of the record to establish that Pueblo was at the time of acquisition in interstate commerce bars a Section 7 violation, it has no affect whatsoever upon the attempted monopoly charge made in Paragraph 11 of the complaint. As we pointed out above, Luria does have a monopoly position in the Rcoky Mountain area. It acquired Pueblo for the purpose and with the effect of forging the last link of a complete monopoly. However, this situation will be remedied by the order of prohibiting the continua-

tion of exclusive dealing between Luria and the two mill respondents found in this market.[87]

The Acquisition of Southwest Steel Corporation

On February 1, 1950, Luria purchased all of the outstanding stock of Southwest Steel Corporation, a scrap broker-dealer engaged in interstate commerce, having its principal office and place of business in Pittsburgh, Pennsylvania. At the time of the acquisition, Southwest had yard or branch offices in various places in the eastern United States, including Memphis, Tennessee; McKeesport, Glassport and Pittsburgh, Pennsylvania. In the year of the acquisition, 1950, Southwest opened a new brokerage office in Portsmouth, Ohio. The McKeesport yard was closed approximately a year after the acquisition. The Memphis yard was "transferred" to Luria who continued to operate it. At the time of the acquisition, Southwest owned a controlling interest in Continental Iron & Steel Corporation, a scrap broker operating in New York area.

The hearing examiner found that prior to the acquisition, Luria and Southwest had competed substantially in both the purchase and sale of scrap. It would appear, however, that the record does not supply figures to disclose the precise extent to which they competed in the purchase of scrap. The most that can be found with respect to this element is that they did compete. Both companies had yards in Pittsburgh; both companies purchased scrap in the New York area; and both purchased, to a certain extent, along the Mississippi River.

---

[87]The Geneva, Utah, plant of United States Steel Company and the Pueblo, Colorado, plant of Colorado Fuel and Iron Corporation are the only significant scrap consuming units in the Rocky Mountain area.

Opinion of the Commission (November 15, 1962)

The picture is much clearer with respect to competition in the sale of scrap to consumers. The evidence indicates that Southwest and Luria were in substantial and direct competition in the sale of scrap to consumers in the Pittsburgh-Youngstown area. The augmentation of Luria's position in this market as a result of its 1950 acquisition of Southwest is illustrated by the following tabulation:

PURCHASES BY ALL MAJOR CONSUMERS IN THE PITTSBURGH-YOUNGSTOWN MARKET[38]

(Gross Tons)

	Total Purchases From Brokers & Dealers	Total Purchases From Luria Brothers[39]	Luria Brothers Percentage[39]
1945	3,636,772	551,052	15.2
1946	3,242,309	677,568	20.9
1947	4,637,205	947,892	20.4
1948	5,167,085	1,062,837	20.6
1949	3,771,057	987,317	26.2
1950	5,902,631	2,198,293	37.2
1951	5,376,487	1,729,935	32.2
1952	6,134,485	2,169,547	35.4
1953	5,417,524	1,979,401	36.5
1954	3,172,631	1,142,953	36.0

[38]Luria's challenge to the validity of this tabulation is similar to the charges it levels against Appendix A. It complains that the tabulation should list Luria's share of the total purchases of the reporting mills rather than merely its share of the reporting mills broker and dealer purchases. As we view it, acceptance of this proposal would not materially change the picture which the figures present. For example, Luria's percentage of the market in 1945 would be 13.49% rather than the 15.2% indicated by the tabulation above. Its 1950 postmerger share would be 34.9% rather than 37.2%. Luria also objects to the failure of the survey upon which the tabulation is based to include the purchases by the smaller consumers and foundries located in this area. The hearing examiner concluded, and we agree, that the inclusion of these additional small consumers in the survey would not have materially altered its results since it is reasonable to find, and the record supports, a finding that Luria serves as great a percentage of this unsurveyed group as it does the reporting mills.

[39]1950 through 1954 figures include purchases from subsidiary Southwest Steel Corporation.

Opinion of the Commission (November 15, 1962)

In 1949, the year prior to the acquisition, Southwest sold 220,666 tons of scrap to the major consumers located in this area. The table shows Luria's sales during that year to the same group of consumers totaled 987,317 tons. Southwest's sales represented 5.9% of the total purchases made by said major consumers from broker-dealer sources. Luria's percentage of this market in 1949 was 26.2% of the total purchases. Luria's share of the market during the five-year period prior to the acquisition averaged approximately 20%. During the first five postmerger years, it averaged 35%. Almost all of this increase was contributed by Southwest. Its separate share of the broker-dealer market after the acquisition was: 1950—14.3%, 1951—11.9%, 1952—14.3%, 1953—13.3%, 1954—8.8%.

The hearing examiner extensively examined the relative strength of the other brokers competing with Southwest and Luria in the Pittsburgh-Youngstown market. He concluded on the basis of reliable and probative evidence that Southwest was, next to Luria, "far and away the largest single factor" in the market in 1949. The sales of the next largest company were only about one-half or less of the sales of Southwest. The respondent Luria contests the validity of these findings, primarily challenging the accuracy of the sales figures and market statistics upon which they are founded. We have carefully examined this contention and conclude that the record is adequate to support the findings made. While it is true that in certain instances the figures used were arrived at by calculation or presumption, there is nothing invalid about such an approach when the exact figures are either not available or can only be produced through the expenditure of an unreasonable amount of time and expense. Respondent has utterly failed to demonstrate

the inaccuracy of any of the figures used and did not offer different figures of its own.

As a result of our review of all of the record facts pertaining to this acquisition, we are satisfied that the hearing examiner's ultimate findings and conclusions are correct, reasonable and, indeed, the only findings possible under these circumstances. In particular we endorse Finding 53 of the initial decision, which reads as follows:

> "53. From the evidence as a whole, including the substantial share of the market held, respectively, by Luria and Southwest when the acquisition occurred; the adverse conditions in the industry when the acquisition took place; the relative size and strength of Luria and Southwest in comparison with their competitors in the market; the substantial additional entree which the acquisition afforded Luria into the Pittsburgh district plants of U. S. Steel (the largest single purchaser of scrap in the market), as well as into the plants of other substantial customers, such as Jones & Laughlin and Pittsburgh Steel, to which Southwest was a substantial supplier; and from the other facts and circumstances discussed above indicative of the potentialities which the acquisition had for curtailing competition between the two respondent brokers both in the buying and selling of scrap, it is concluded and found that Luria's acquisition of the stock of Southwest was calculated to result in a substantial lessening of competition between the two companies, and to restrain commerce in the Pittsburgh-Youngstown market and other markets, and tended to create a monopoly in Luria in said market and other markets. The record fails to establish,

however, that Luria's failure to publicize its acquisition of control of Southwest gave it any substantial unfair competitive advantage in the buying or selling of scrap."

Thus, we are satisfied that Luria's acquisition of Southwest violates Section 7 of the Clayton Act. And we are equally sure that effective and lively competition in the Pittsburgh-Youngstown market requires that the two major brokers in the area be competitors, unaffiliated with each other.

Moreover, in harmony with the hearing examiner's finding that the acquisition was "calculated" to lessen competition, we find that the acquisition was a deliberate and purposeful step toward an eventual monopoly. Luria consciously acquired the largest and most effective competitor in the market thereby eliminating its competition and augmenting Luria's own position of dominance.

The Acquisition Order

As we pointed out above, complaint counsel requested the hearing examiner to enjoin Luria from making any future acquisitions of competitiors. The hearing examiner denied this request, saying at page 353 of the initial decision:

"In the opinion of the examiner, the record fails to establish a pattern of acquisitions of such magnitude or nature as to justify a remedy as drastic as a perpetual injunction against further acquisitions, without regard to the size and competitive position of the company acquired, and the probable competitive impact of such acquisitions on particular mar-

> kets. The need for such a broad prohibition requires a showing far stronger than is here present."

Considered as a matter of law, we find ourselves at odds with this conclusion. It is apparent that the hearing examiner considered the acquisition or merger aspects of this proceeding as separate and divorced from all of the other charges in the complaint. He relies solely on his finding that the record ". . . fails to establish a pattern of acquisitions of such magnitude or nature as to justify . . ." the remedy of enjoining future acquisitions. In our view the necessity for a remedy prohibiting future acquisitions is not determined solely by the respondent's past pattern of acquisitions but by a review of many factors, including the character of past violations of all kinds, the market position or degree of dominance achieved and the probability that future acquisitions will violate the law. In *United States* v. *W. T. Grant Co.*,[40] the Supreme Court stated:

> "The purpose of an injunction is to prevent future violations, *Swift & Co.* v. *United States*, 276 U. S. 311, 326 (1928) and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive."

An order prohibiting future acquisitions unless they are shown to be without adverse competitive effects is, in our opinion, less harsh than an order of divestment. The latter order may require a massive disruption of the corporate

[40] 345 U. S. 629 (1953).

organization and is, in effect, to require a forced sale which may conceivably result in a considerable loss. The hearing examiner's view that stronger evidence is required to support an injunction is at odds with that of the courts, which have found evidence to be insufficient to justify divestiture, but adequate to entitle the Government to injunctive relief against future acquisitions.[41]

The hearing examiner's decision would afford the public no protection against the 100% monopolization of markets already dominated except the tedious and lengthy procedure of a new complaint and trial for each acquisition. It would then be faced with the usual problem of attempting to unscramble assets and restore as healthy competitors companies which may possibly have been completely demolished and their assets scattered to the four winds. While this is a burden incident to any Section 7 proceeding, it should not be assumed when it is so clearly unnecessary.

This record shows that Luria has acquired a near monopoly position in several appreciable markets throughout the Nation. For example, in 1954, in the eastern Pennsylvania market, Luria had 83.3% of the total broker-dealer scrap sales. In that year, it had 74.5% of the total broker-dealer sales in the North Atlantic market. Given these statistics, it seems to us apparent that any future acquisitions of scrap brokers' or dealers' companies by Luria in these markets will, of necessity, further diminish competition and unlawfully increase Luria's near monopoly position. The same situation is present in other markets, albeit to a lesser extent.

The hearing examiner does not describe the "far stronger" evidence which he deemed necessary to justify an injunctive remedy of this type but he apparently gave no

---

[41] *United States* v. *Jerrold Electronics Corp., et al.*, 187 Fed. Supp. 545 (D. C. Pa. 1960); *affirmed per curiam* 365 U. S. 567 (1961).

weight to the facts showing that Luria's near monopoly position has been acquired by resort to acts violative of the antitrust laws. This was error. In considering the need for an injunctive against future acquisitions in *United States* v. *Crescent Amusement Co.*,[42] the Supreme Court stated:

> "The growth of this combine has been the result of predatory practices condemned by the Sherman Act. The object of the conspiracy was the destruction or absorption of competitors. It was successful in that endeavor. The pattern of past conduct is not usually foresaken. Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis. The acquisition of a competing theatre terminates at once its competition. Punishment for contempt does not restore the competition which has been eliminated. And where businesses have been merged or purchased and closed out it is commonly impossible to turn back the clock."

In that case, the court held that what was needed was an order which would not flatly prohibit all future acquisitions but which would restrain them lacking an affirmative showing that such acquisitions would not unreasonably restrain competition. It is our view that this is an appropriate remedy in this matter. However, in the expectation that our order directed against continuation of exclusive dealing between Luria and the mills will effect a substantial relief of the anticompetitive conditions existing in the markets, it is our belief that a perpetual injunction against future acquisitions is not required. A five-year period of enforced abstinence from acquisitions should accomplish

---

[42] 323 U. S. 173, 185 (1944).

the desired end of providing a "breathing space" within which competition may be restored.

To prevent the possibility of the injunction having unintended harsh results, we deem it best that an escape clause be contained therein which will permit Luria to make such acquisitions as it can affirmatively show will not have adverse competitive effects. We are willing to assume the burden of scrutinizing Luria's proposed acquisitions for the five-year period since it is certain to prove less onerous than the alternative presented by the hearing examiner's approach of bringing a new and separate action with each future acquisition. An appropriate order drawn along these lines will issue.

The Remaining Charges

In Paragraphs Ten and Eleven (a), Luria is charged with having purposefully injured competition and created a tendency toward monopoly by utilizing various unfair practices. The hearing examiner dismissed all of these charges either as unproved or as lacking in competitive effect. Complaint counsel's appeal takes exception to each of the dismissals.

Our review of the extensive evidence adduced in support of these charges disclosed no error in the hearing examiner's disposition of them. These peripheral charges consumed trial time out of proportion to their importance and an extensive discussion here would serve no useful purpose. We are satisfied with the hearing examiner's decision on these charges and adopt his findings and conclusions with respect thereto as our own.

The various appeals by respondents and complaint counsel are granted to the extent heretofore indicated.

Commissioner Elman dissented to the decision in this matter, and Commissioners MacIntyre and Higginbotham did not participate.

November 15, 1962

Comparison of Purchases by Reporting Mills from Luria Brothers and Subsidiaries with Total from All Brokers and Dealers, by Designated Areas.

Area	1947			1948			1949			1950			1951		
	Total Brokers and Dealers	Luria Brothers and Subsidiaries		Total Brokers and Dealers	Luria Brothers and Subsidiaries		Total Brokers and Dealers	Luria Brothers and Subsidiaries		Total Brokers and Dealers	Luria Brothers and Subsidiaries		Total Brokers and Dealers	Luria Brothers and Subsidiaries	
	1000 g.t.	1000 g.t.	Percentage [110]	1000 g.t.	1000 g.t.	Percentage	1000 g.t.	1000 g.t.	Percentage	1000 g.t.	1000 g.t.	Percentage	1000 g.t.	1000 g.t.	Percentage
United States--Total	15,931	2,730	17.1	17,319	3,258	18.8	12,756	2,848	22.3	18,235	5,369	29.4	18,232	5,719	31.4
Non-respondents [109]	11,102	994	9.0	12,561	1,375	10.9	8,954	982	11.0	13,125	2,242	17.1	12,567	1,882	15.0
Respondents	4,829	1,736	35.9	4,757	1,883	39.6	3,802	1,866	49.1	5,110	3,128	61.2	5,665	3,837	67.7
Pacific Coast--Total	1,005	2	0.2	1,152	*	**	906	60	6.6	894	104	11.7	1,202	255	21.2
Non-respondents	603	2	0.3	722	*	**	566	44	7.8	530	32	6.0	686	59	8.6
Respondents	403	-	-	430	-	-	340	15	4.5	364	72	19.9	516	196	37.9
Rocky Mountain--Total	231	230	99.3	306	287	94.0	287	283	98.6	355	338	95.2	450	393	87.2
Non-respondents	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Respondents	231	230	99.3	306	287	94.0	287	283	98.6	355	338	95.2	450	393	87.2
North Atlantic--Total	3,229	1,103	34.1	3,119	1,187	38.1	1,988	931	46.8	2,713	1,480	54.6	3,280	2,034	62.0
Non-respondents	644	159	24.7	662	140	21.1	499	125	25.0	698	190	27.2	771	209	27.1
Respondents	2,586	943	36.5	2,458	1,048	42.6	1,490	806	54.1	2,015	1,290	64.0	2,509	1,826	72.7
Eastern Pennsylvania--Total	1,620	786	48.5	1,626	842	51.8	1,015	592	58.3	1,323	958	72.4	1,644	1,187	72.2
Non-respondents	296	123	41.5	315	133	42.1	189	86	45.5	281	147	52.2	330	181	54.7
Respondents	1,324	663	50.1	1,310	710	54.2	826	506	61.2	1,043	811	77.8	1,314	1,006	76.5

* Less than 500 g.t.

** Less than .05 percent.

Data shown for "non-respondents" throughout table include purchases by the United States Steel Corp., except its Columbia-Geneva Steel Division, Erie, Pennsylvania.

All percentage figures throughout table were calculated before tonnage figures were rounded to thousands

APPENDIX A

Comparison of Purchases by Reporting Mills from Luria Brothers and Subsidiaries with Total from All Brokers and Dealers, by Designated Areas

	1949			1950			1951			1952			1953			1954		
and as ant-	Total Brokers and Dealers	Luria Brothers and Subsidiaries		Total Brokers and Dealers	Luria Brothers and Subsidiaries		Total Brokers and Dealers	Luria Brothers and Subsidiaries		Total Brokers and Dealers	Luria Brothers and Subsidiaries		Total Brokers and Dealers	Luria Brothers and Subsidiaries		Total Brokers and Dealers	Luria Brothers and Subsidiaries	
	1000 g.t.	1000 g.t.	Percent-age	1000 g.t.	1000 g.t.	Percent-age	1000 g.t.	1000 g.t.	Percent-age	1000 g.t.	1000 g.t.	Percent-age	1000 g.t.	1000 g.t.	Percent-age	1000 g.t.	1000 g.t.	Percent-age
.8	12,756	2,848	22.3	18,235	5,369	29.4	18,232	5,719	31.4	20,620	6,875	33.3	19,935	7,281	36.5	14,099	4,751	33.7
.9	8,954	982	11.0	13,125	2,242	17.1	12,567	1,882	15.0	14,339	2,335	16.3	13,404	2,318	17.3	10,068	1,588	15.8
.6	3,802	1,866	49.1	5,110	3,128	61.2	5,665	3,837	67.7	6,281	4,540	72.3	6,531	4,963	76.0	4,030	3,164	78.5
	906	60	6.6	894	104	11.7	1,202	255	21.2	1,278	424	33.1	1,066	488	45.8	821	416	50.6
	566	44	7.8	530	32	6.0	686	59	8.6	713	109	15.3	517	74	14.4	421	94	22.3
	340	15	4.5	364	72	19.9	516	196	37.9	566	315	55.7	549	414	75.4	400	322	80.4
.0	287	283	98.6	355	338	95.2	450	393	87.2	357	323	90.6	222	212	95.5	214	211	98.9
.0	287	283	98.6	355	338	95.2	450	393	87.2	357	323	90.6	222	212	95.5	214	211	98.9
.1	1,988	931	46.8	2,713	1,480	54.6	3,280	2,034	62.0	3,776	2,596	68.8	4,196	3,059	73.1	2,145	1,597	74.5
.2	499	125	25.0	698	190	27.2	771	209	27.1	826	257	31.1	866	219	25.3	426	99	2312
.6	1,490	806	54.1	2,015	1,290	64.0	2,509	1,826	72.7	2,950	2,339	79.3	3,331	2,850	85.6	1,719	1,498	87.1
.8	1,015	592	58.3	1,323	958	72.4	1,644	1,187	72.2	1,873	1,387	74.1	2,058	1,625	78.9	1,015	845	83.3
.1	189	86	45.5	281	147	52.2	330	181	54.7	400	224	56.0	425	194	45.6	162	86	53.1
.2	826	506	61.2	1,043	811	77.8	1,314	1,006	76.6	1,473	1,163	79.0	1,633	1,431	87.6	853	759	89.0

by the United States Steel Corp., except its Columbia-Geneva Steel Division, Utah District, and by Bucyrus-Erie, except its plants located in

ge figures were rounded to thousands

Dissenting Opinion (November 15, 1962)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:
Paul Rand Dixon, *Chairman*
Sigurd Anderson
Philip Elman
Everette MacIntrye
A. Leon Higginbotham, Jr.

In the Matter of	DOCKET No. 6156
LURIA BROTHERS AND COMPANY, INC., a corporation, et al.	

Commissioner Elman, dissenting:

Begun almost a decade ago, this case has already produced a mountain of words, and I am reluctant to add some of my own. But the difficulties I find in the Commission's disposition of the case may also be encountered by others, including a reviewing court. It may be worthwhile, therefore, to outline the reasons why I cannot join the majority opinion.

Broadly described, the facts of the case are quite simple: The period covered by the complaint was the Korean conflict, when steel and scrap were in extremely short supply. In the space of a few years the scrap market became concentrated to a striking degree in the hands of a single company. Luria was able to achieve this dominant position because many of the nation's largest steel mills purchased all or substantially all their scrap requirements from it. As a result, many of these mills' previous suppliers of scrap were squeezed out competitively.

In such a factual situation, there are at least four theories which, either separately or together, might conceivably support a conclusion of illegality. I shall discuss below each of these theories and its relevance to this proceeding on the basis of the record now before the Commission. As will appear, the fourth of these theories is the one that seems to underlie the Commission's decision. A preliminary caveat must, however, be sounded.

A major problem with the majority opinion, as I read it, is that one cannot be sure of the precise theory on which the case is being decided. Like the complaint, the opinion is liberally sprinkled with references to "agreements", "understandings", "combinations", "conspiracies", "unfair practices", "incipient monopoly", "exclusive dealing arrangements", and other familiar antitrust war-horses. But—and it may be that this is a subjective reaction that will not be shared by others—in the majority opinion these old and faithful warriors seem not to be marching progressively in a straight and unwavering line towards a clearly defined objective but to be rambling over the field, moving uncertainly in several loosely-drawn lines and in various different directions at the same time. As a result, one cannot speak with absolute assurance of the theory of the majority opinion. At all events, in order that my own position may be made clear, I shall proceed now to examine each of the four possible theories of decision that might be applicable to the factual situation here.

(1) The examiner in his initial decision focused upon the arrangements between Luria and each of the mills whereby the latter bought its scrap requirements from Luria. He found these arrangements to be "equivalent" to exclusive dealing agreements prohibited by Section 3 of the Clayton Act, and therefore in violation of Section 5 of the

Federal Trade Commission Act. As the majority opinion points out (p. 15), however, the examiner did not find that these arrangements "were pursued deliberately with the intent to effect a monopoly."

The difficulty with the examiner's theory is that the record does not show that each mill's practice of purchasing exclusively from Luria was not equally consistent with the hypothesis that, in this period of short supply, it considered that Luria was the supplier best able to furnish scrap of the kind needed, at the time needed, and in the quantities needed. The arrangements between Luria and the mills were not exclusive in the sense that they tied the mills to a single source of supply. Like a housewife who buys milk for her family regularly and exclusively from a single dairy, a mill buying scrap from Luria remained free to stop doing so at any time and for any reason. The so-called exclusive supply arrangements neither restrained the mills' freedom to buy from other suppliers nor foreclosed Luria's rival suppliers from the opportunity to sell to the mills. If, like the housewife, a mill's patronage of Luria was not an exclusive dealing arrangement in the Section-3-of-the-Clayton-Act sense, was not tainted by an anticompetitive motive or purpose, and was not part of an illegal conspiracy or concert of action with others, the examiner's theory would not support a conclusion of illegality.

(2) A second possible theory of violation would be that the mills conspired or agreed that each would use Luria as its exclusive buying agent for the purpose of restraining competition in the purchase of scrap. But, although alleged in the complaint, this was not proved. At the close of the case-in-chief, the examiner dismissed the complaint to the extent that it charged such a conspiracy or agreement

among the mills. So that, on the present record, the majority could not, and do not, find violation on any theory of "horizontal" conspiracy or agreement among the mills.

(3) A third possible theory of violation, which might have provided a plausible basis for a conclusion of illegal conduct by the mills, was neither alleged nor proved. As the majority opinion states (p. 7), "The potential monopolizer at which the complaint is primarily aimed is respondent Luria." The complaint might, however, have been predicated on the theory (1) that it was the mills, not Luria, which held the dominant economic power in the market for scrap; (2) that, in the sellers' market which prevailed during the Korean conflict, it was in the self-interest of the mills to avoid competition among themselves in obtaining scrap; and (3) that in this situation each mill considered that, if it purchased scrap directly or through its own broker, competition among the mills in procuring scrap would result in bidding up the price, whereas if they all bought their scrap requirements from a single central broker, the price would be kept down since a supplier of scrap, being compelled to deal with one broker representing all buyers, could not play off one buyer against another.

On such a theory, it might have been shown that, without a conspiracy or agreement among them, each mill used Luria as its exclusive broker for the purpose of restraining competition in the market for scrap, knowing that each of the other mills was following the same practice for the same purpose and with the same knowledge. Had it been alleged and proved, this theory of violation might have supported an order prohibiting each of the mills from using Luria, or any other broker, to accomplish monopolistic or other anticompetitive objectives. But the present record was

not made on any such theory, and the majority neither rely upon nor refer to it.

(4) I come, finally, to the theory of violation on which the majority do seem to base their decision. As already indicated, I am not altogether sure that my understanding of the majority opinion is correct. At the risk of misstating it, therefore, I would express the theory accepted by the majority as follows: (1) Luria deliberately attempted to monopolize the scrap market; (2) each of the mills conspired with Luria to achieve such a monopoly, deliberately aiding and abetting it in its monopolistic attempt; (3) the proof of such attempt and conspiracy to monopolize, and of the existence of a deliberate monopolistic purpose and intent, both as to Luria and the mills, is found in the unlawful exclusive dealing agreements or understandings between Luria and each mill; (4) those agreements or understandings were unlawful because of their effects on competition, and the purpose with which they were entered is therefore immaterial; and (5) nonetheless, being unlawful, the agreements or understandings establish the requisite "specific intent" to monopolize, both in Luria and the mills.

The majority opinion proceeds on the premise (p. 9) that

> "An attempt to monopolize is established by proof that the respondent or defendant acted with deliberation and purpose, i.e., with 'specific intent.' The existence of 'specific intent' is a conclusion based upon an examination of the business practices pursued by the potential monopolist. Some actions which clearly indicate deliberateness are the pursuit of acts and practices which violate other provisions of the antitrust laws * * *." (Footnotes omitted.)

And where in this record do the majority find the illegal acts and practices "which clearly indicate deliberateness"? In the so-called exclusive dealing arrangements between the mills and Luria. On the majority's theory of the case, the illegality of each mill's patronage of Luria is the inchpin of decision, upon which depends the crucial finding of attempted monopolization and conspiracy to monopolize.

Thus, although the opinion purports to reject the examiner's theory that the mills' practice of buying scrap from Luria constituted exclusive dealing agreements in violation of Section 3 of the Clayton Act, the majority nevertheless are driven to embrace his conclusion that these arrangements were "exclusive" and hence unlawful.

The majority opinion, reflecting the difficulties involved in simultaneously both rejecting and accepting the examiner's Section 3 theory, states (pp. 14-15) that the examiner's theory of the case is not "crystal clear", that "on balance, it would appear that the hearing examiner relies in the main upon a Section 3 [of the Clayton Act] theory", and that "Actually, the difference between our view and that of the hearing examiner is not as great as may at first appear."

Later on in the majority opinion, in the part specifically devoted to "The Respondents' Purpose" (pp. 29-32), a general finding is made of a purpose to monopolize, on the part of both Luria and the mill respondents. But this finding is expressly and entirely based upon the illegality of the "exclusive" dealing agreements between Luria and each mill. No other factual support is cited. To overcome the absence from this record of express indications of "deliberateness" or "specific intent", the Commission states "that there exists between Luria and each mill respondent an agree-

ment, understanding, combination and conspiracy pursuant to which Luria supplies each of the mills with all or substantially all of its needs of scrap. The effect of these arrangements is to exclude competing scrap sellers from a substantial market and thus each of the agreements constitutes an unlawful conspiracy." (Majority opinion, p. 18.) "It is of no consequence", the opinion further states (pp. 30-31), "that the record does not establish that the exclusive use of Luria is the product of an agreement among the respondent mills for we are concerned here with effects rather than means."

The majority opinion thus puts all its eggs in one basket. Everything is made to depend on the *illegality* of the exclusive patronage of Luria by each of the mill respondents. If that drops out, the rest of the basket falls with it.

As I have already pointed out in discussing the examiner's theory of violation, the practice whereby each mill bought its scrap requirements from Luria cannot be held illegal merely on the basis of its effects on Luria's competitors. Each mill was not "tied" exclusively to Luria in its purchases of scrap, and its practice of buying exclusively from Luria was as consistent with a purpose of assuring itself a dependable source of supply as with an unlawful monopolistic or anticompetitive purpose. The examiner, as I have also pointed out, did not find any such unlawful purpose, and the majority opinion (p. 15) expressly notes but does not disturb his initial decision in that regard.

If, as I believe, the record fails to establish that each mill's patronage of Luria was "exclusive" in the Section-3-of-the-Clayton-Act sense, or was part of an unlawful conspiracy or agreement, or was accompanied by a monopolistic or anticompetitive purpose, such buying practices by the mills cannot be characterized as "unlawful" in order to dis-

pense with the need for adducing adequate proof of a "specific intent" to monopolize.

Moreover, even if the mills' use of Luria as their exclusive scrap broker could be relied on to show a monopolistic purpose on their part, that would not suffice to show that Luria, against which the order here is primarily directed, had a like monopolistic purpose. Assuming that, so far as the mills were concerned, they deliberately set out to create a monopoly in the scrap market for Luria, it would still be necessary to prove that Luria attempted to obtain such a monopoly for itself or acquired it through illegal means. If there be such proof in the record, the majority opinion does not refer to it.

Finally, my difficulties with the Commission's disposition of this case are not limited to those which emerge from a reading of the majority opinion.

Reflecting its emphasis upon the role of Luria and upon the alleged exclusivity of the arrangements between it and the mills, the Commission's order is directed primarily against Luria. But, if the danger to competition derives as much from the mills as from Luria, the latter's elimination as a "monopolist" broker in scrap would in itself accomplish only part of the necessary relief. Nothing in the order would prevent the mills from establishing some other broker as a monopolist and using it for the purpose of eliminating competition in the purchase of scrap—assuming, of course, that the record showed that Luria had been so used.

Moreover, the Commission's order, based as it is upon events of nearly a decade ago, has little relevance to present conditions in the scrap market. As already noted, the period covered by the complaint was a sellers' market in which the mills had a clear interest in purchasing through a single broker. It is common knowledge that in recent years, how-

ever, the steel industry has been characterized by production falling far short of capacity. Whether, and how, this has affected the competitive situation today in the market for scrap is something on which the record sheds no light.[1] And, similarly, the extent to which the elimination of Luria's "monopolistic" position (assuming it still exists today) in the scrap business will have practical benefits for the public is a matter for conjecture.

In this posture of the case, with so much time, money, and energy having been expended in this drawn-out proceeding, it is not necessary to conclude that the complaint should be dismissed. The Commission has another alternative: to bring the record up-to-date by conducting a broad economic investigation into present-day conditions in the scrap business, and, on the basis of such an inquiry, to determine what corrective administrative action, if any, is required to maintain or reestablish healthy competition. If illegal practices be found, they should be promptly corrected. But, to accomplish that objective, the Commission should be able to find ways and means more effective than the action which the two members of the Commission, who in this case comprise a majority, are taking today.

November 15, 1962

---

[1]The 1962 Institute of Scrap Iron & Steel Yearbook, in discussing the market for scrap during 1961, states that "With steel production for the year hovering around 70 per cent of capacity, only a spurt during the Spring brought scrap demand up to expectations. Domestic consumption of purchased scrap was 22.6 million gross tons compared with the previous year's 23.6 million and 1959's 25.7 million," and that "The factors of creating this decline in the scrap industry have been present for several years with varying impact" (pp. 5-6). It also indicates that monthly consumption of purchased scrap has declined from about three million gross tons in January 1953, to less than two million tons in December 1961, while scrap inventories at consumers' plants increased from six million to nearly eight million tons.

Final Order

UNITED STATES OF AMERICA

BEFORE

Federal Trade Commission

Commissioners:

Paul Rand Dixon, *Chairman*
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of

LURIA BROTHERS AND COMPANY, INC.,
a corporation,
SOUTHWEST STEEL CORPORATION,
a corporation,
BETHLEHEM STEEL CORPORATION,
a corporation,
BETHLEHEM STEEL COMPANY,
a corporation,
BETHLEHEM PACIFIC COAST STEEL CORPORATION,
a corporation,
UNITED STATES STEEL CORPORATION,
a corporation,
NATIONAL STEEL CORPORATION,
a corporation,
WEIRTON STEEL COMPANY,
a corporation,
COLORADO FUEL AND IRON CORPORATION,
a corporation,
JOHN A. ROEBLING'S SONS CORPORATION,
a corporation,
CENTRAL IRON AND STEEL COMPANY,
a corporation,
PHOENIX IRON AND STEEL COMPANY,
a corporation,
GRANITE CITY STEEL COMPANY,
a corporation,
LUKENS STEEL COMPANY,
a corporation,
DETROIT STEEL CORPORATION,
a corporation,
MCLOUTH STEEL CORPORATION,
a corporation,
BALDWIN-LIMA-HAMILTON CORPORATION,
a corporation,
EDGEWATER STEEL COMPANY,
a corporation,
BUCYRUS-ERIE COMPANY,
a corporation,
COLUMBIA MALLEABLE CASTINGS CORPORATION,
a corporation,
HUGO NEU CORPORATION,
a corporation.

DOCKET NO. 6156

Respondents having filed exceptions to the proposed final order and the Commisison having determined for the reasons set out in the accompanying memorandum that certain of said exceptions should be allowed and the proposed final order modified in certain respects:

IT IS ORDERED that the proposed final order be modified to read as follows and that as modified it be, and hereby is, entered and adopted as the final order of the Commission:

1. IT IS ORDERED that the respondent broker, Luria Brothers & Company, Inc., its officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the sale of iron and steel scrap in commerce, do forthwith cease and desist from:

> Contracting or agreeing to act or knowingly acting as exclusive or substantially exclusive broker or supplier of purchased iron and steel scrap for any plant or plants of any respondent mill or of any other buyer of iron and steel scrap not a party hereto, and from knowingly inducing or receiving preferential status or favored treatment of any nature as broker or supplier of purchased iron and steel scrap for any respondent mill or any other buyer of iron and steel scrap.

2. IT IS FURTHER ORDERED that the respondent mills, Bethlehem Steel Corporation, Bethlehem Steel Company, Bethlehem Pacific Coast Steel Corporation, United States Steel Corporation, National Steel Corporation, Weirton Steel Company, The Colorado Fuel and Iron Corporation, John A. Roebling's Sons Corporation, Phoenix Iron & Steel Company, Granite City Steel

Company, Lukens Steel Company, Detroit Steel Corporation, McLouth Steel Corporation, Baldwin-Lima-Hamilton Corporation, Edgewater Steel Company, Bucyrus-Erie Company, and Grinnell Corporation, their respective officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the purchase of iron and steel scrap in commerce, do each forthwith cease and desist from:

(a) Purchasing, or contracting or agreeing to purchase, all or substantially all of the annual requirements of purchased iron and steel scrap of any plant or plants from or through respondent Luria Brothers & Company, Inc., and from giving preferential status or favored treatment of any nature to said broker, as broker or supplier of iron and steel scrap.

(b) During a period of five (5) years from the date this order shall become final, purchasing in excess of 50% of the annual requirements of purchased iron and steel scrap of any plant or plants from respondent Luria Brothers & Company, Inc., except to the extent that iron and steel scrap, adequate in quantity and quality, is not available from other suppliers on terms which are substantially similar and competitive with the terms offered by respondent Luria Brothers & Company, Inc.

3. IT IS FURTHER ORDERED that respondent Luria Brothers & Company, Inc., its officers, agents, representatives and employees, acting separately or in combination with anyone else, whether a party to this proceeding or not, directly or through any cor-

porate or other device, do forthwith cease and desist from:

Entering into, continuing, cooperating in, or carrying out any express or implied understanding, agreement, combination or conspiracy with any steel producing company or group of steel producing companies beyond the continental limits of the United States, or any buying organization, agent or other buyer acting for or on behalf of such steel producing companies, to act as the exclusive or substantially exclusive broker or supplier for such company or companies, of iron and steel scrap obtained in the continental United States or within the territorial jurisdiction of the United States.

4. IT IS FURTHER ORDERED that respondent Luria Brothers & Company, Inc., do forthwith cease and desist from:

During a period of five (5) years from the date this order shall become final, acquiring, directly or indirectly, through subsidiaries or in any other manner, the assets, stocks, share capital, or any other interest in any business, corporate or otherwise, which is engaged in the business of buying or selling iron and steel scrap as a broker or dealer, unless and until the Commission, upon application and proper showing in support thereof, shall first find that the planned acquisition will not unduly restrain competition.

5. IT IS FURTHER ORDERED that respondent Luria Brothers & Company, Inc., do forthwith divest itself absolutely, in good faith, of:

(a) All stock or other share capital, and all control over or interest in all stock or other share capital of Southwest Steel Corporation; and

(b) All assets, properties, rights and privileges, tangible and intangible, acquired from Southwest Steel Corporation since December 29, 1950; together with any assets or other properties of whatever description that may have been added thereto since December 29, 1950, as may be necessary to restore said corporation to at least the same operating condition that existed, and competitive position that it occupied, when its assets or properties were so acquired, so as to retain neither directly nor indirectly any of the fruits of such acquisition.

IT IS FURTHER ORDERED that in the divestiture hereinbefore mentioned, none of the stock, assets, properties, rights or privileges to be divested shall be sold or transferred, directly or indirectly, to any one who at the time of the divestiture is a stockholder, officer, director, employee, or agent of, or is otherwise directly or indirectly connected with, or under the control or influence of, respondent Luria Brothers & Company, Inc., or of any of said respondent's subsidiary, affiliated or related companies.

6. IT IS FURTHER ORDERED that the complaint be, and the same hereby is, dismissed as to respondents Southwest Steel Corporation and Hugo Neu Corporation, and as to those allegations or portions thereof as have been found not to have been sustained by the evidence.

IT IS FURTHER ORDERED that respondents shall, within ninety (90) days from the date of service upon them of this order, submit in writing for the consideration and approval of the Federal Trade Commission their plans for compliance with this order, including the date within which compliance can be affected.

IT IS FURTHER ORDERED that the hearing examiner's initial decision as modified and supplemented by the accompanying opinion and this order be, and it hereby is, adopted as the decision of the Commission.

By the Commission, Commissioners MacIntyre and Higginbotham not participating. Commissioner Elman, having dissented from the Commission's decision, does not concur in this order.

SEAL

JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

ISSUED: February 13, 1963

Petition On Respondents' Exceptions to the Proposed Final Order (February 13, 1963)

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, *Chairman*
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of LURIA BROTHERS AND COMPANY, INC., a corporation, et al.	Docket No. 6156

ON RESPONDENTS' EXCEPTIONS TO THE PROPOSED FINAL ORDER

By the Commission:

Pursuant to § 4.22(c) of the Commission's Rules of Practice, the respondent Luria and each of the mill respondents have filed exceptions to the proposed order to cease and desist issued by the Commission on November 15, 1962. An answer opposing allowance of said exceptions has been filed by counsel supporting the complaint. The Commission has carefully considered the exceptions and opposition thereto and in this memorandum states its conclusions and announces its decision thereon.

Several of the exceptions filed by the respondents are merely reiterations of previously ruled-upon questions and

others constitute little more than disagreement with the Commission's decision to issue an order to cease and desist. Comment here on such exceptions would be repetitious and unproductive. On the other hand, several of the exceptions are properly directed to revised portions of the order and to these exceptions we now direct our attention.

The respondent Luria points out that Paragraph 1 of the order ". . . does not make it clear that what is involved is the total scrap supplied to each plant." As we view it, this exception would equally apply to Paragraph 2 of the order. The hearing examiner's initial decision, which was adopted by the Commission, points out that a consuming steel mill receives, or may receive, its scrap from three different sources. Most of the mills, and in particular those which are forwardly integrated, produce large amounts of scrap as a by-product of their operations. This so-called "home scrap" is, of course, reused by the mills and not infrequently makes up a substantial part of their total scrap requirements. "Home scrap" is only incidentally involved in this proceeding and when the order speaks of a mill's "requirements", as it does in Paragraph 2(a) or forbids Luria to act as the "exclusive or substantially exclusive" supplier to any mill, it refers to a mill's need for scrap from outside sources, i.e., from direct suppliers and from brokers or dealers. Scrap from these sources is collectively referred to throughout this case as "purchased scrap" and we have used this term in Paragraph 2(b) of the order. In the interests of clarity and consistency, we will order that Paragraphs 1 and 2(a) be amended to make it manifest that a mill's requirements of "purchased scrap" is the subject thereof.

Both respondent Luria and the mill respondents plead that the order is vague and indefinite in that terms such as

"substantially all," "preferential status," and "favored treatment" are incapable of exact definition and do not inform the respondents of precisely what is prohibited. Respondents had previously raised this objection with respect to similar words appearing in the hearing examiner's proposed order. Since we did not specifically deal with this in our opinion, it is appropriate that we comment on it here. By forbidding the mills to purchase, or Luria to supply, "all or substantially all" of the mills' requirements of "purchased scrap," we, of course, contemplate situations of the type disclosed by this record. We are concerned that an order which merely forbids the purchase or supply of "all" of a mill's requirements could be easily evaded by the receipt of a miniscule single shipment from a competing broker or dealer. By adding the words "substantially all" to the order, we hope to guard against this deficiency and to plainly indicate that compliance with this order can only be effected by the mill respondents purchasing a substantial portion of their requirements of "purchased scrap" from suppliers other than Luria.

As for the terms "preferential status" and "favored treatment," the order plainly envisions the type of conduct practiced by the respondents as revealed in this record. Certainly, minimally, the respondents may not receive or grant any of the types of discriminations which would violate the Robinson-Patnam Act. Brokers dealing with the mill respondents must receive like pay for like goods and services and they cannot be restricted to limited shipping points while Luria is granted the right to ship from all points. To comply fully with this provision, all that is required is for the mill respondents to make sure that Luria is not granted any discriminatory competitive advantages over its com-

petitors in supplying scrap to the mill respondents and for Luria to refrain from the inducement or receipt of such advantages.

Perhaps the most serious exception raised by respondent Luria is that Paragraph 1 fails to take into consideration the fact that Luria may not be in a position to know whether it is the exclusive or substantially exclusive supplier to any mill or whether the mill is giving it preferential status or favored treatment. Luria asks that the paragraph be amended by insertion of the word "knowingly" before the word "acting" and before the words "inducing or receiving preferential status." Complaint counsel's opposition to this exception avers that "It is idle for it [Luria] to say it may not be in a position to know. . . ." We are not so sure. Certainly this record reveals that in many instances Luria was not only aware of its exclusive position but knowingly induced it and did everything in its power to maintain the position. But this order is operative against Luria's activities with all customers, present and future, and it is not reasonable to expect that Luria will be completely familiar with the exact scrap requirements of all customers. It seems to us that basic justice decrees that Luria should not be held to account or made subject to penalties for conduct violative of this order unless it can be shown that it knew, or should have known, that it was supplying substantially a customer's full requirements. Thus we shall adopt the respondent's suggestion and insert the word "knowingly" in Paragraph 1 as suggested, with the understanding, of course, that the term "knowingly" encompasses constructive, as well as actual, knowledge.

The mill respondents raise the point that Paragraph 2(a) does not specify any period of time in respect of which

the terms "all" and "substantially all" are to be applied. In response to this exception we shall amend Paragraph 2(a) of the order to make it clear that a plant's annual requirements of purchased scrap are dealt with therein.

The respondent United States Steel Corporation objects to the order's application to its Geneva, Utah, plant. It alleges that only respondent Luria is capable of supplying this plant with the scrap it needs and that the practical effect of the paragraph as now drafted would make it necessary for this respondent to purchase scrap from West Coast and Chicago suppliers. It is pointed out that the higher freight rates accruing on shipments from these suppliers would impose higher material costs on the Geneva plant and adversely affect its competitive situation. This objection was previously made to the order of the hearing examiner by the other respondents and we briefly discuss it at page 32 of our opinion. Certainly we do not expect any of the respondent mills to operate under the economic handicap of higher scrap prices stemming from the application of this order. We believe that the record clearly indicates that additional suppliers of scrap are ready and anxious to do business with the United States Steel Corporation's Geneva plant. The record reveals that brokers who offered to sell scrap to the Geneva plant were turned down and that the plant then purchased the identical scrap through respondent Luria.

Several of the mill respondents object to the application of the order to plants owned by them or their subsidiaries where the record does not contain evidence as to the buying practices of said plants. It is argued that the restrictive effect of the order should be confined to plants located in geographic markets where anticompetitive conditions have

been found to exist. These objections overlook the fact that the Commission has found a tendency to monopoly in a market consisting of the entire country, as well as in the lesser geographic areas defined. The record reveals that Luria's share of the national broker-dealer scrap market increased from 17 per cent in 1947 to almost 34 per cent in 1954. It is the Commission's view that this trend cannot be inhibited unless the order has broad application to Luria's activities wherever and with whomever practiced.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
1. The industry and the parties	3
2. The arrangements	4
3. Competitive impact of the scrap supply arrangements	10
4. Proceedings below	12
Argument	14
Conclusion	23

CITATIONS

Cases:

Albrecht v. *Herald Co.*, 390 U.S. 145	16
American Committee v. *Subversive Activities Control Board*, 380 U.S. 503	21
Atchison, T. & S. F. Ry. Co. v. *United States*, 284 U.S. 248	21
Atlantic Refining Co. v. *Federal Trade Commission*, 381 U.S. 357	14, 18, 19
Federal Trade Commission v. *Brown Shoe Co.*, 384 U.S. 316	14, 15
Federal Trade Commission v. *Cement Institute*, 333 U.S. 683	22
Federal Trade Commission v. *Colgate-Palmolive Co.*, 380 U.S. 374	19
Federal Trade Commission v. *Consolidated Foods Corp.*, 380 U.S. 592	22
Federal Trade Commission v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257	21
Federal Trade Commission v. *Motion Picture Advertising Co.*, 344 U.S. 392	14

Cases—Continued Page

Federal Trade Commission v. *National Lead Co.*, 352 U.S. 419 ..... 19, 20, 22
Grand Union Co. v. *Federal Trade Commission*, 300 F. 2d 92 15
Illinois Cent. R. Co. v. *Norfolk & W. R. Co.*, 385 U.S. 57 21
Interstate Commerce Commission v. *City of Jersey City*, 322 U.S. 503 21
Siegel Co. v. *Federal Trade Commission*, 327 U.S. 608 19
Standard Oil Co. v. *United States*, 337 U.S. 293 18
United States v. *Aluminum Co. of America*, 148 F. 2d 416 21
United States v. *General Motors Corp.*, 384 U.S. 127 ..... 15, 19
United States v. *Parke, Davis & Co.*, 362 U.S. 29 16
United States v. *Philadelphia National Bank*, 374 U.S. 321 11
United States v. *United States Gypsum Co.*, 340 U.S. 76 20

Statutes:

Clayton Act:

Section 2(d) (15 U.S.C. 13(d)) 15
Section 3 (15 U.S.C. 14) 12, 13, 15
Section 7 (15 U.S.C. 18) 13

Federal Trade Commission Act, as amended:

Section 5 (15 U.S.C. 45) 2, 3, 12, 13, 14, 15, 18, 21
Section 5(a)(1) (15 U.S.C. 45(a)(1)) 2

Sherman Act, Sections 1 and 2 (15 U.S.C. 1 and 2) 13, 14, 15

Miscellaneous:

Freedman, *The Uses and Limits of Remand in Administrative Law: Staleness of the Record*, 115 U. Pa. L. Rev. 145 (1966) 21

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 125

LURIA BROTHERS AND COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

No. 126

BALDWIN-LIMA-HAMILTON CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-33a)[1] is reported at 389 F.2d 847. The hearing examiner's

---

[1] "App." refers to the appendix to the petitions for certiorari. "L. Pet." refers to the petition in No. 125, filed by Luria Brothers and Company, Inc. (hereinafter "Luria"). "M. Pet." refers to the petition in No. 126, filed by Baldwin-Lima-Hamilton Corporation and other steel mills. "R." refers to volumes I through VII of the joint appendix filed in the court of appeals.

initial decision (R. IV, 2161a-2668a) and the final order and opinion of the Federal Trade Commission (App. 40a-121a) are reported at 62 F.T.C. 597 and 652.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1968. A petition for rehearing was denied on February 27, 1968. The petitions for writs of certiorari were filed on May 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld the Federal Trade Commission's determination that arrangements by which the petitioning steel producers purchased all or substantially all of their iron and steel scrap requirements from petitioner Luria violated Section 5 of the Federal Trade Commission Act.

2. Whether the court of appeals correctly upheld the cease and desist order entered by the Commission to redress the anticompetitive effects of such arrangements.

STATUTE INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, as amended by 52 Stat. 111 and 66 Stat. 632 (15 U.S.C. 45(a)(1)), provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioners seek review of the unanimous judgment of the court of appeals affirming a Federal Trade Commission decision (App. 34a) which concluded that Luria had entered into an exclusive or substantially exclusive scrap supply arrangement with each petitioning steel mill in violation of Section 5 of the Federal Trade Commission Act.

1. *The Industry and the Parties.* Scrap and pig iron are the principal metals used in making iron and steel. Approximately one-half of the industrial requirements for scrap is supplied by the steel mills themselves from wastes generated by their own activities. The remainder must be purchased from outside sources of discarded iron and steel products. This scrap is collected by junk dealers and peddlers for resale to larger dealers who in turn resell the scrap to brokers or in some cases directly to consumers in competition with brokers. The dealers operate yards where they take possession of the scrap and thereafter sort and process it, while the brokers purchase and resell scrap for their own account without actually taking physical possession of it. A single company may operate both as a scrap dealer and as a broker (App. 5a-6a, 41a-42a; R. III, 1989a-1992a; R. VI, 5696a-5698a).

Luria Brothers and Company, Inc. (petitioner in No. 125) is the largest company in the United States engaged in the business of buying and reselling iron and steel scrap, operating both as a broker and as a dealer (App. 6a-7a, 41a-42a; R. I, 23a, 45a). The 14

petitioners in No. 126 are engaged in various aspects of the production and manufacture of steel products and purchase susbtantial quantities of scrap for use as a raw material in producing "new" iron and steel (App. 42a-43a).[2]

Started in 1889 as a family business in Reading, Pennsylvania, Luria has grown to become the largest scrap broker in the United States with 16 offices and six yards located throughout the United States. By 1946 Luria had already become a substantial supplier to 11 of the petitioning steel mills (App. 6a-7a). It was at approximately this time that Luria entered into arrangements or understandings with a number of the petitioning steel producers to become the substantially exclusive scrap supplier for these companies.

2. *The Arrangements.* The Federal Trade Commission's investigation of the scrap iron industry uncovered a pattern of rapidly developing exclusivity of purchases by the petitioning mills from Luria during

---

[2] Among the 14 petitioning mills, Bethlehem Steel Corporation ("Bethlehem") is the largest scrap purchaser in the Eastern part of the United States as well as on the Pacific Coast (App. 12a, 14a; R. IV, 2203a-2204a; R. VI, 5628a-5638a, 5850a). CF&I Steel Corporation ("CF&I") operates the largest scrap consuming plant in the Rocky Mountain area (App. 14a; R. VI, 5647a, 5683a). Weirton Steel Company is the third largest scrap consumer in the Pittsburgh-Youngstown area (R. VI, 5861a-5862a). Granite City Steel Company ("Granite City") is the largest scrap purchaser in the St. Louis area (App. 8a; R. VI, 5864a). Phoenix Steel Corporation and Lukens Steel Company are, respectively, the second and fourth largest scrap purchasers in the North Atlantic area (R. V, 5490a; R. VI, 5621a-5698a). Petitioners' purchases of scrap represent approximately 22 percent of the total domestic scrap purchases (App. 43a; see *id.* at 9a).

the seven-year period beginning with 1947. The nature and formality of the arrangements between Luria and each producer were not, however, uniform.

Bethlehem Steel Corporation, the second largest steel producer in the United States, operates through two subsidiary companies, Bethlehem Steel Company, an East Coast operation, and Bethlehem Pacific Coast Steel Corporation, based on the West Coast (R. IV, 2203a). Prior to 1950, Bethlehem Steel's scrap purchases from Luria for its four plants in the North Atlantic area were relatively small (R. VI, 5630a, 5632a-5634a). Between 1947 and 1949, Luria's share of scrap sales to Bethlehem rose from 15 to 32 percent. This trend accelerated after 1950 to give Luria 83 percent of Bethlehem's purchases in 1954 (App. 12a; R. VI, 5630a, 5632a-5634a). In the meantime, Bethlehem discriminated against many of its former suppliers who also were Luria's competitors (App. 13a).[3] Thus, the Schiavone-Bonomo Corporation, which in 1947 was Bethlehem's second largest scrap

[3] Bethlehem's discrimination took the form of lower brokerage commissions and territorial restrictions. In addition, Bethlehem specifically advised some of Luria's competitors that if they wished to sell scrap to Bethlehem, they would have to do so through Luria (App. 13a; R. I, 487a-510a, 599a-607a, 618a; R. II, 822a-823a, 826a, 959a-965a, 1227a-1228a; R. VII, 6051a-12, 6051a-13, 6051a-14, 6051a-17, 6051a-24, 6051a-27). Indeed, Luria's dominance was further enhanced by Bethlehem's decision to channel shipments from direct suppliers such as industrial fabricators and railroads through Luria (App. 13a; R. I, 329a-342a, 719a-720a, 741a-749a; R. II, 918a, 921a). In consequence, Bethlehem once rejected a large offer of needed scrap from one of Luria's competitors and then purchased the same order from Luria after the latter paid the original broker a dollar more per ton (App. 59a).

supplier (R. VII, 6051a-12), underwent a serious decline in sales to Bethlehem and was subjected to specific discrimination by Bethlehem (R. I, 382a, 420a-423a, 568a, 576a-584a, 590a-592a; R. IV, 2211a-2217a; R. V, 5217a-5218a, 5227a-5229a). By 1954, Schiavone-Bonomo was no longer among Bethlehem's five largest suppliers (R. VII, 6051a-15, 6051a-16, 6051a-18, 6051a-54).

Bethlehem Pacific's practices on the West Coast were not unlike those of its sister company in the East. Until 1950, Bethlehem Pacific purchased scrap from numerous dealers, among which Luria was included only after 1948 (R. III, 1760a-1762a; R. IV, 2262a, 2284a; R. VII, 6054a, 6058a). In October 1950, Luria entered into a ten-year written contract with Bethlehem Pacific to supply its Los Angeles plant (R. IV, 2262a, 2265a-2269a; R. V, 5181a-1-5181a-8). Thereafter, some brokers who had previously supplied the three Bethlehem Pacific plants were told they would have to sell through Luria (App. 15a; R. III, 1635a-1637a, 1646a-1648a, 1668a-1673a, 1676a-1678a, 1687a, 1693a-1697a, 1704a-1705a, 1730a-1731a, 1778a-1781a, 1840a-1842a, 1858a, 1897a, 1902a-1903a, 1915a-1916a, 1935a-1936a). As a result, Luria's position as a scrap supplier of Bethlehem Pacific's Los Angeles plant climbed from one percent in 1949 to 57 percent in 1951 and 94 percent in 1953 (R. VI, 5636a).

Luria entered into similar formal arrangements with the only two plants operating in the Rocky Mountain area, the Geneva, Utah, plant of United States Steel Corporation and the Pueblo plant of the

Colorado Fuel & Iron Corporation (now CF&I Steel Corporation). The Geneva plant accepted Luria's offer to act as its exclusive broker in October 1948 (App. 14a; R. I, 73a; R. IV, 2308a), and announcement of this appointment was sent to the trade (R. IV, 2311a-2312a; V, 5002a). Although U. S. Steel asserts that the agreement was terminated in 1952, no announcement of this fact was disseminated to the trade or even to Luria's home office (App. 14a; R. I, 226a-227a; R. II, 1526a-1527a; R. III, 1558a-1559a, 2129a-2130a). Indeed, Luria's percentage of scrap purchases by the Geneva plant suffered no decline thereafter (R. IV, 2319a; R. VI, 5694a).

CF&I's Pueblo plant is the largest scrap-consuming facility in the Rocky Mountain area (R. VI, 5647a, 5683a). In late May 1946, by its own admission, CF&I informally contracted with Luria to the effect that the latter would serve as the exclusive broker for the Pueblo plant (App. 57a, R. I, 90a; R. IV, 2293a-2294a, 2305a). Formal notice to the trade was transmitted immediately thereafter with direction that future offers of scrap be submitted through Luria's St. Louis office (R. IV, 2294a; R. V, 5167a). The understanding was formalized by a written five-year contract executed on August 23, 1946. The written agreement was terminated on October 9, 1946, by mutual consent of the parties,[4] leaving the earlier oral agreement, however, in full force (App. 14a; R. IV, 2295a, 2307a; R. V, 5168a). Consequently, Luria supplied

---

[4] No announcement of the cancellation was made to the trade (R. IV, 2296a).

100 percent of the scrap purchased by CF&I for its Pueblo plant from 1947 through 1954, except during 1951 when Luria's percentage dropped to 95.4 percent (App. 14a; R. IV, 2296a; R. VI, 5647a).[5] And the success of this arrangement from the parties' view eventually led to extension of the exclusive arrangement to CF&I's other plants in the East.

In the St. Louis area Luria entered into a similar arrangement with the Granite City Steel Company, the largest scrap purchaser in that region. Prior to 1950, Granite City purchased nearly all the scrap it consumed from brokers and dealers other than Luria (App. 15a; R. IV, 2349a; R. VI, 5652; R. VII, 6161a-6164a). In March 1950, Granite City and Luria agreed that the later would provide the mill with its future scrap requirements and the trade was subsequently notified of the arrangement (App. 15a; R. II, 1065a-1066a, 1099a-1100a; R. IV, 2349a-2350a, 2353a; R. V, 5171a; R. VII, 6160a). Granite City's former suppliers were thereafter told to submit offers to sell scrap only through Luria (App. 15a; R. II, 1113a-1115a, 1153a-1155a; R. IV, 2350a-2351a; R. VI, 5915a).

Grinnell Corporation's total scrap needs for its Columbia, Pennsylvania, plant were secured through Luria, except in 1951 and 1952, the period of government allocations, when Luria supplied 96 percent and 98 percent, respectively (R. IV, 2384a-2385a; R. VI, 5649a). The trade generally understood Luria to be Grinnell's exclusive broker, and it was the company's

---

[5] This decline was due to the availability in 1951 of scrap allocated to the Pueblo mill by government regulations.

established policy to purchase scrap solely from Luria, ignoring offers from other brokers and dealers (R. I, 145a-146a; R. II, 977a-978a, 985a-986a; R. III, 2384a).

A similar arrangement existed between Luria and Bucyrus-Erie Company ("Bucyrus") with respect to the latter's foundries in Erie, Pennsylvania (App. 16a; R. IV, 2379a-2380a; see also R. II, 1043a), and between Luria and Lukens Steel Company ("Lukens") with respect to the latter's plant at Coatesville, Pennsylvania (App. 13a; R. IV, 2359a). Suppliers who attempted to sell to Bucyrus or Lukens were advised that Luria was its broker, and that shipments should be made through Luria (R. II, 1041a-1046a, 1375a-1378a; R. IV, 2359a-2360a, 2381a; R. V, 5007a, 5405a, 5456a, 5458a-5459a). Thus, between 1947 and 1954, Luria supplied between 87 and 91 percent of Lukens' scrap requirements (R. VI, 5653a), and, in 1954, it provided about 84 percent of Bucyrus' scrap needs (App. 10a).

Luria enjoyed similar supply arrangements with Central Iron and Steel Company and Phoenix Iron and Steel Company, subsidiaries of Barium Steel Company;[6] Baldwin-Lima-Hamilton Corporation;[7] Weirton Steel Company, a subsidiary of National

---

[6] R. II, 876a-878a; R. IV, 2343a-2348a; R. V, 5892a; R. VI, 5626a. The Commission found that such agreements existed only with respect to a single plant of each of these companies (R. IV, 2343a).

[7] R. I, 125a-126a; R. II, 936a-937a, 940a; R. IV, 2369a-2372a; R. VI, 5622a. The finding relating to Baldwin-Lima-Hamilton was based on an exclusive supply arrangement found to have existed at its Burnham, Pennsylvania, plant.

Steel Corporation;[8] Edgewater Steel Company;[9] Detroit Steel Corporation;[10] and McLouth Steel Corporation.[11] All of these companies, together with those previously discussed, comprise the petitioners in No. 126.

3. *Competitive Impact of the Scrap Supply Arrangements.* In evaluating the economic consequences of the arrangements between Luria and the petitioning steel companies, the Commission determined that iron and steel scrap was the relevant line of commerce (App. 60a-63a), and tested the effects of the arrangements in five basic geographic markets, a regional subdivision within one of these markets, and the nation as a whole (App. 63a-64a).[12]

---

[8] R. I, 557a-558a, 563a-564a, 620a-622a, 624a; R. II, 800a-801a, 809a-810a, 817a-818a, 839a, 1315a, 1362a-1363a, 1366a-1367a, 1388a-1395a; R. IV, 2331a-2335a; R. VI, 5658a.

[9] R. IV, 2340a-2343a.

[10] R. I, 275a-276a; R. II, 1274a-1278a, 1281a-1283a, 1432a-1434a; R. IV, 2362a-2365a.

[11] R. I, 119a-120a; R. II, 1443a-1448a; R. IV, 2366a-2368a; R. VI, 5654a.

[12] Luria appears to challenge the data upon which the Commission measured the affects of the arrangements in the various geographic markets (L. Pet. 8-9). Although the Commission constructed a universe based upon scrap purchases from broker-dealer sources which accounted for more than 90 percent of all scrap purchases by 99 percent of domestic steel mills (R. V, 5496a), Luria would apparently require the Commission to canvass as well industrial fabricators, railroads and shipyards which occasionally sell scrap as an incidental feature of their principal operations. As the court below correctly pointed out, however, the Commission was not obliged to undertake a task which "would have reached enormous if not

The steel mill petitioners operating in the North Atlantic region accounted for 80 percent of all scrap purchases from broker-dealer sources between 1947 and 1954. This region represented approximately 20 percent of the nationwide scrap purchases from such sources by domestic mills (App. 7a-8a; R. VI, 5621a-5698a, 5850a; R. VII, 6228a-6340a). During the same period Luria's share of the total scrap purchases in the North Atlantic region increased from 34.1 percent in 1947 to 74.5 percent in 1954 (App. 9a; R. VI, 5850a, 5862a, 5864a). Furthermore, in the eastern Pennsylvania subdivision the petitioning mills accounted for 84 percent of all scrap purchases from broker-dealer sources by 1954, of which Luria represented 83.3 percent (App. 9a).

In the Pittsburgh-Youngstown area, the petitioning steel mills accounted for 18 percent of the total purchases from broker-dealer sources in 1954. Between 1947 and 1954, Luria increased its share of these purchases from 20.4 percent to 36 percent (App. 9a).

Only one of the petitioners, Granite City, operates in the St. Louis area, and it accounts for nearly one-half the scrap purchases from broker-dealer sources there. In this market Luria's share increased from 16.5 percent in 1949 to 45.4 percent in 1954, after having reached a peak of 51.7 percent in 1951 (App. 9a).

Petitioners CF&I and U. S. Steel operate the only two mills in the Rocky Mountain area which purchase

---

prohibiting proportions" and "would not have substantially altered the result" (App. 17a). See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 364 n. 40.

scrap from broker-dealer sources. Luria has dominated this market throughout the period in question, and has enjoyed more than a 90-percent share thereof in every year from 1947 to 1954 except 1951 (App. 9a).

In the Pacific Coast region, the sole petitioning mill in the area, Bethlehem Pacific, represented almost one-half of all the scrap purchases of the mills in that area. Luria increased its share of this market from 6.6 percent in 1949 to 50.6 percent in 1954 (App. 9a).

In the United States as a whole, the petitioning mills accounted for between 24 and 38 percent of scrap purchases during the seven-year period, and Luria's share of this market increased during that period from 17.1 percent in 1947 to 36.5 percent in 1953, with a three-percent decline the following year (App. 9a).

4. *Proceedings Below.* Following extensive administrative proceedings between January 12, 1955, and May 14, 1958, the hearing examiner filed his initial decision on March 29, 1961. He found, *inter alia*, that each of the steel producers named in the complaint entered into an exclusive or substantially exclusive scrap supply arrangement with Luria, which violated the policy of Section 3 of the Clayton Act, and that these arrangements thus violated Section 5 of the Federal Trade Commission Act. The examiner's order directed Luria to cease and desist from acting as an exclusive supplier of any domestic scrap purchaser, and ordered that each of the violating steel mills refrain from appointing any exclusive scrap broker and from purchasing more than 50 percent of its annual scrap requirements from Luria for a five-

year period, unless an adequate supply could not be acquired elsewhere (R. IV, 2163a-2668a).

Upon review, the Commission, one member dissenting and two members not participating, on November 15, 1962, entered an opinion modifying and affirming the examiner's findings and conclusions (App. 40a-115a). The Commission agreed that the arrangements violated Section 5, but did not rely upon the examiner's Section 3 theory as the basis for holding the exclusive arrangements unlawful as an unfair method of competition. It grounded its decision instead on a finding that the practices were incipient violations of Sections 1 and 2 of the Sherman Act. The Commission thus upheld the examiner's order with certain modifications. Insofar as is relevant here, the Commission modified the restriction against appointment by the mills of exclusive broker-dealers to a prohibition only against appointment of Luria as an exclusive scrap supplier, and made the 50 percent of annual requirements' restriction on purchases from Luria applicable to each plant's requirements rather than the total requirements of each petitioner mill (App. 40a-121a).

On petition for review, the Court of Appeals for the Third Circuit affirmed the Commission's decision in all respects (App. 1a-33a). In addition, the court rejected petitioners' contention that the case should be remanded for new evidence on the ground that the record is stale and should be updated.[13]

---

[13] The Commission also found, and the court affirmed, that Luria had (1) restrained trade in the export market for scrap and (2) violated Section 7 of the Clayton Act by acquiring the

ARGUMENT

In determining that petitioners violated Section 5 of the Federal Trade Commission Act by reason of the arrangements and understandings between Luria and each of the mills relating to the exclusive supply of scrap requirements, the Federal Trade Commission reached a conclusion fully consistent with prior decisions of this Court and the underlying policies of the antitrust laws. The Commission's decision, affirmed on review by the court of appeals, "has 'warrant in the record' and a reasonable basis in law." *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367. Accordingly, review by this Court is not warranted.

1. The Commission found that petitioners' arrangements restrained trade in violation of Section 1, and were likely to confer, if they had not already conferred, upon Luria monopoly power in the relevant markets, in violation of Section 2 of the Sherman Act (App. 75a-77a). It can scarcely be doubted, at this late date, that the Commission may employ Section 5 to arrest in their incipiency restraints of trade or attempts to monopolize, without proof that the challenged conduct amounts to "full-blown" violations of Sections 1 and 2. See *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316, 322; *Federal Trade Commission* v. *Motion Picture Advertising Co.*, 344 U.S. 392, 394-395.

---

stock of a competing scrap broker. Review of these aspects of the Commission's order have not been sought in this Court (see L. Pet. 6).

Petitioners' contention that exclusive dealing arrangements must be governed solely by the standards of Section 3 of the Clayton Act (M. Pet. 13-19) is without substance. As this Court recently pointed out in *Brown Shoe* (384 U.S. at 322), previous decisions "hold that the Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws" (see also App. 19a). It is difficult to conceive of a clearer statement of law cutting directly against petitioners' argument.[14]

Clearly, too, the absence of written agreements between Luria and the individual petitioning mills is immaterial to the establishment of a Section 5 violation based upon conduct inconsistent with policies reflected in Sections 1 and 2 of the Sherman Act. A written agreement is not an essential ingredient to the finding of a restraint of trade in violation of Section 1.[15] See, *e.g.*, *United States* v. *General Motors*

---

[14] Petitioners' reliance on *Grand Union Co.* v. *Federal Trade Commission*, 300 F.2d 92, 98 (C.A. 2) (M. Pet. 14), is similarly misplaced. There the court held that a buyer could be held liable under Section 5 for a violation of Section 2(d) of the Clayton Act, although that provision is directed specifically at sellers. In reaching this result, it noted that the "unfair competition" concept of Section 5 "was left flexible, so that the Commission could apply the broad Congressional standard to the myriad fact situations which would arise" (*ibid.*).

[15] Nor, contrary to petitioners' contention (see L. Pet. 9, 10), is it significant that there might not have been any "economic compulsion" for producers to purchase scrap exclusively from Luria.

Corp., 384 U.S. 127, 142-143; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 43; *Albrecht* v. *Herald Co.*, 390 U.S. 145, 149. As the court below concluded (App. 17a-23a), the widespread arrangements and understandings found by the Commission examiner in the course of his exhaustive hearings provide ample support for the conclusion that the challenged arrangements were combinations which restrained trade and, unless prohibited, were likely to lead to monopoly.

Moreover, petitioners Bethlehem Pacific and U. S. Steel did in fact enter into *written* exclusive dealing contracts with Luria (App. 57a; R. IV, 2263a, 2308a). CF&I and Granite City also admitted to having formal agreements with Luria (App. 57a; R. I, 90a; R. IV, 2292a-2294a, 2349a-2350a). Even when formal agreements were purportedly terminated, no announcement was usually made to the trade, and subsequent purchases by the particular mill from Luria showed no significant decline (R. IV, 2296a, 2304a, 2330a). Although other petitioners contended that their relationships with Luria had no formal basis, there was ample evidence to support the findings of agreement made by the examiner and adopted by the Commission (App. 58a). For example, the purchasing agent for Lukens at the time it commenced buying exclusively from Luria conceded that the relationship might have been founded on an oral agreement (R. IV, 2361a); a buyer for Baldwin-Lima-Hamilton testified that he expected Luria to supply his requirements and that Luria understood what was expected of it (R. IV, 2372a); and Bethlehem Steel documents make ref-

erence to the "overall scrap deal" and "overall scrap arrangements" with Luria (R. IV, 2240a).

With respect to the remaining petitioners, the Commission was persuaded by the impressive statistical evidence of substantially exclusive dealing with Luria over a long period of time, and the sudden replacement of former suppliers by Luria, that agreements were inferentially shown by such courses of conduct. This conclusion was eminently reasonable. In a period of short scrap supply (see L. Pet. 8; M. Pet. 28), it is difficult to believe that significant purchasers would abandon previous sources of supply in favor of an exclusive supplier without a reciprocal commitment from the supplier to provide them with at least the volume of scrap they had previously been able to obtain elsewhere. As the Commission observed, "Such a massive change in an entire method of doing business would hardly be undertaken without some advance understanding" (App. 59a).

The exclusive supply arrangements resulted in substantial foreclosure of all the relevant markets to competitors of Luria (see *supra*, pp. 10-12). The most dramatic effects were felt in the North Atlantic and Rocky Mountain areas, where the petitioning mills were the only or the dominant scrap purchasers (App. 7a-8a; R. IV, 2591a-2592a, 2598a). And, in the Pacific Coast and St. Louis areas, Luria had exclusive supply arrangements with mills controlling approximately one-half of scrap purchases from broker-dealer sources (R. IV, 2597a, 2605a). Of course the amount of foreclosure effected by any one arrangement is not dispositive of its illegality. On the instant

record the Commission could justifiably be concerned about the anticompetitive effect of the widespread use of such arrangements between Luria and the several petitioning mills, representing as they did a substantial part of the scrap market. See *Atlantic Refining Co.* v. *Federal Trade Commission*, *supra*, 381 U.S. at 371; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 314.

Petitioners appear to argue (L. Pet. 9, 10-11, 16-17; M. Pet. 20-21) that the challenged arrangements cannot be held to violate Section 5, despite their demonstrable anticompetitive impact, because they are terminable at will by the mills and, in any event, the mills were motivated by "legitimate business objectives" in determining to make Luria their exclusive or substantially exclusive source of supply. But even an agreement terminable at will may continue to affect competition adversely while the parties voluntarily adhere to it. So long as such adherence is given, the arrangement is effective, and may be found unlawful. As the court below noted, "[T]here had been no termination in the past and the prospects for any in the future were negligible" (App. 22a).

On the question of purpose, the Commission found that at least some of the mills recognized that establishing Luria as an exclusive scrap broker would prevent competition among brokers for available scrap which might drive up the price to the mills. Findings detailing specific acts of discrimination against Luria's competitors (R. IV, 2211a-2257a, 2330a-2331a, 2351a) reinforce the conclusion that the challenged arrangements were intended to restrain competition and confer monopoly power upon Luria. That

some of the petitioners might also have had legitimate business reasons for participating in demonstrably anticompetitive arrangements cannot save the schemes from condemnation. Cf. *United States* v. *General Motors Corp.*, 384 U.S. 127, 142.

2. Petitioners' objections to the provisions of the cease and desist order (M. Pet. 24-27; see also L. Pet. 7) not only rest upon their misconception of the basis of the Commission's decision (see the discussion *supra*, pp. 14-15), but ignore the Commission's broad authority to take effective remedial action against violations it has found to exist. All these objections were carefully considered and rejected by the court of appeals (App. 23a-28a).

This Court has repeatedly confirmed and upheld the wide discretion given the Federal Trade Commission in promulgating orders designed to assure prompt termination of statutory violations found to exist. See, *e.g.*, *Atlantic Refining Co.* v. *Federal Trade Commission*, *supra*, 381 U.S. at 376; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428. The Commission's judgment is not to be set aside except where the remedy chosen lacks any reasonable relationship to the unlawful practices it seeks to correct. *Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612-613; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-395.

The Commission's objective here was to adopt a remedial formula designed to ensure that Luria and the mills can no longer, with or without formal agreement, restrain any appreciable amount of trade in the scrap iron industry, and also to arrest any possibility that such conduct might lead to the achievement by

Luria of monopoly power in any of the markets in which it operates. In the main, petitioners object to the provision prohibiting each mill from purchasing more than 50 percent of its scrap requirements for any of its plants from Luria for a period of five years. However, this provision was reasonably designed to correct the competitive imbalance created by the illegal arrangements, by ensuring that a substantial market would be available in which Luria's competitors could reestablish themselves. As the Commission explained in adopting this restriction, "By freeing the remaining 50% [of scrap purchases] to Luria's competitors, the hearing examiner intended to provide a 'breathing spell' of five years, during which competition could be restored" (App. 80a). See *Federal Trade Commission* v. *National Lead Co.*, *supra*, 352 U.S. at 429-430; *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88. This restriction, moreover, is of limited duration, and does not apply if the mill petitioners are unable to acquire adequate supplies of scrap from Luria's competitors on terms substantially similar to those which Luria offers. Accordingly, the order is narrowly drawn to meet the specific objectives of prompt termination of past violations and restoration of competition, and is neither arbitrary nor unduly harsh.

3. Finally, petitioners' contention that the Commission's order should not be enforced because of the alleged "staleness" of the record (L. Pet. 9; M. Pet. 27-29) is without merit. Administrative proceedings are frequently lengthy and a time lag between violation and remedy is inevitable in many cases. Accord-

ingly, except where the record is rendered totally obsolete by supervening events,[16] this Court has repeatedly upheld administrative refusals to grant demands for rehearings or reopenings of records on claims of changed conditions or abandonment of unlawful conduct. See, *e.g.*, *Interstate Commerce Commission* v. *City of Jersey City*, 322 U.S. 503, 514-515; *Illinois Cent. R. Co.* v. *Norfolk & W. R. Co.*, 385 U.S. 57, 75.[17]

These considerations have particular force with respect to Federal Trade Commission orders. Abandonment of unfair practices or intervening changes in the marketing practices should not prevent the Commission from acting to assure that past violations of law do not recur. See *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257; Freedman, *The Uses and Limits of Remand in Administrative Law: Staleness of the Record*, 115 U. Pa. L. Rev. 145, 183, n. 190 (1966).[18]

---

[16] See, *e.g.*, *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U.S. 248, 260-262; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 445-446 (C.A. 2).

[17] In this regard, petitioners' reliance (L. Pet. 7; M. Pet. 29) on *American Committee* v. *Subversive Activities Control Board*, 380 U.S. 503, is misplaced. There the statute required an organization which is *presently* a Communist-front organization to register as such (*id.* at 505), and the Board's 1960 order was based primarily on evidence taken at least five years earlier, during which time the group's one-time leader had died (*id.* at 504-505). Conversely, Section 5 empowers the Commission to proceed against past as well as present violations, if corrective measures are needed.

[18] Commission orders have been upheld by this Court on several occasions in which the cease and desist order was based

In the instant case, while the bulk of the record concerns the period 1949-1954, the record remained open before the Commission until May 7, 1958 (R. I, 7a), and the Commission retained jurisdiction in the case as late as May 21, 1963, when the certified index of the record was filed in the court of appeals.[19] Yet the petitioners, during this period, made no effort to reopen or supplement the record to attempt to show that the evidence of record did not accurately reflect continuing conditions in the industry. Under the circumstances, the court of appeals was fully warranted in concluding that the exhaustive record here compiled presented a reliable picture of the conditions in the scrap industry and thus justified enforcement of the Commission's Order (App. 33a).

---

upon proof dating back approximately the same number of years as in the present situation. See *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683; *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592.

[19] There were 113 days of hearings in this case, from January 12, 1955, until May 14, 1958, at which the testimony of more than 250 witnesses was received, covering approximately 14,000 pages (App. 2a; R. I, 4a-6a). In addition, the record consists of approximately 130 pages of depositions and 1,300 documentary exhibits totaling about 10,000 pages (App. 2a). The initial decision contains approximately 500 pages and the Commission's opinion 76 pages (R. IV, 2163a-2668a; App. 40a-115a). In light of these factors, the court below understandably concluded (App. 33a): "Although the proceedings in this action of necessity have been prolonged, the solid overall picture presented by the record calls for a final decision thereon at this time and not for its return to the Commission."

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

EDWIN M. ZIMMERMAN,
Assistant Attorney General.

GREGORY B. HOVENDON,
WILLIAM R. WEISSMAN,
Attorneys.

JAMES McI. HENDERSON,
General Counsel.

J. B. TRULY,
Assistant General Counsel.

FREDERICK H. MAYER,
DAVID B. MORRIS,
Attorneys.
Federal Trade Commission.

AUGUST 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 314387 52